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THE

LAW REPORTS.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

REPORTED BY

CHARLES CLARK, QUEEN'S COUNSEL;
JOHN FRASER MACQUEEN, QUEEN'S COUNSEL;
HERBERT COWELL, BARRISTER-AT-LAW.

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ERRATA.

Page 452, line 19, *for* "the extension of trust property" *read* "the retention of trust property."

" 488, n., *for* "were held to be" *read* "held not to be."

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

PAGE

A.

Advocate-General of Bengal, Lyons (Mayor of) *v.* - P. C. 91
Aiton *v.* Stephen - H. L. (Sc.) 456
Alleyn's College, Dulwich, *In re* P. C. 68
Allison *v.* Bristol Marine Insurance Company - H. L. (E.) 209
All Saints, Wigan (Churchwardens of), Reg. *v.* H. L. (E.) 611
Anderson *v.* Morice H. L. (E.) 713
Anderston Foundry Company, Harrison *v.* - H. L. (Sc.) 574
Attorney-General, De Thoren *v.* H. L. (Div.) 686
——————, North London Railway Company *v.* H. L. (E.) 148

B.

Bain *v.* Brand - H. L. (Sc.) 762
Bank of British North America *v.* Strong - - - P. C. 307
Barclay, Clyde Navigation Company *v.* - - H. L. (Sc.) 790
Battison, Minors *v.* H. L. (E.) 428
Belhaven and Stenton Peerage. Claim of James Hamilton. Claim of Lieutenant-Colonel Hamilton - - H. L. (Sc.) 278
Bell *v.* Receiver of Land Revenue of Southland - - P. C. 707
Blair, Ramsay *v.* - H. L. (Sc.) 701
Brand, Bain *v.* - H. L. (Sc.) 762
Bristol Marine Insurance Company, Allison *v.* H. L. (E.) 209

C.

Clyde Navigation Company *v.* Barclay - - H. L. (Sc.) 790
Commercial Union Assurance Company, Pearson *v.* H. L. (E.) 498
Currie, Misa *v.* - H. L. (E.) 554

D.

Damodhar Gordhan *v.* Deoram Kanji - - - P. C. 332
Deoram Kanji, Damodhar Gordhan *v.* - - - P. C. 332

PAGE

De Thoren *v.* Attorney-General H. L. (Div.) 686
Dixon *v.* London Small Arms Company – – H. L. (E.) 632
Drummond, Montreal (Corporation of) *v.* – – P. C. 384

E.

Edwards *v.* Warden H. L. (E.) 281

F.

Fishmongers' Company, Lyon *v.* H. L. (E.) 662
Forwood, Rhodes *v.* H. L. (E.) 256

G.

Garden Gully United Quartz Mining Company *v.* McLister P. C. 39
Goodwin *v.* Robarts H. L. (E.) 476
Gordon, Nanson *v.* H. L. (E.) 195
Green *v.* Reg. – H. L. (E.) 513

H.

Hamilton (James), Claim of. Belhaven and Stenton Peerage H. L. (Sc.) 278
Hamilton (Lieutenant-Colonel), Claim of. Belhaven and Stenton Peerage – H. L. (Sc.) 278
Harper, Hutton *v.* H. L. (Sc.) 464
Harris, Moore *v.* – – P. C. 318
Harrison *v.* Anderston Foundry Company – – H. L. (Sc.) 574
Hollyman *v.* Noonan – P. C. 595
Hutton *v.* Harper – H. L. (Sc.) 464

I.

Joachim, O'Shanassy *v.* – P. C. 82

K.

Kellie (Earl of), Claim of. The Mar Peerage – H. L. (Sc.) 1

L.

Liberia (Republic of) *v.* Roye H. L. (E.) 139

PAGE

London and North Western Railway Company, Radley *v.* H. L. (E.) 754
London (Corporation of), Thorn *v.* H. L. (E.) 120
London Small Arms Company, Dixon *v.* – – H. L. (E.) 632
Lows *v.* Telford – H. L. (E.) 415
Lyon *v.* Fishmongers' Company H. L. (E.) 662
Lyons (Mayor of) *v.* Advocate-General of Bengal – P. C. 91

M.

McLister, Garden Gully United Quartz Mining Co. *v.* – P. C. 39
Mar Peerage (The). Claim of the Earl of Kellie H. L. (Sc.) 1
Minors *v.* Battison – H. L. (E.) 428
Misa *v.* Currie – H. L. (E.) 554
Molleson, Phosphate Sewage Company, *v.* – – – 780
Montreal (Corporation of) *v.* Drummond – – P. C. 384
Moore *v.* Harris – – P. C. 318
Morice, Anderson *v.* H. L. (E.) 713

N.

Nanson *v.* Gordon – H. L. (E.) 195
Noonan, Hollyman *v.* – P. C. 595
North-London Railway Company *v.* Attorney-General H. L. (E.) 148

O.

O'Shanassy *v.* Joachim – P. C. 82

P.

Pearson *v.* Commercial Union Assurance Company H. L. (E.) 498
Phosphate Sewage Company *v.* Molleson – – H. L. (Sc.) 780

R.

Radley *v.* London and North Western Railway Company H. L. (E.) 754
Ramsay *v.* Blair – H. L. (Sc.) 701

PAGE

Receiver of Land Revenue of Southland, Bell v. – P. C. 707
Reg. v. All Saints, Wigan (Churchwardens of) H. L. (E.) 611
——, Green v. – H. L. (E.) 513
Republic of Liberia v. Roye H. L. (E.) 139
Rhodes v. Forwood H. L. (E.) 256
Robarts, Goodwin v. H. L. (E.) 476
Roye, Republic of Liberia v. H. L. (E.) 139

S.

Stephen, Aiton v. – H. L. (Sc.) 456
"Strathnaver," Owners of Ship, Turnbull v. – – P. C. 58
Strong, Bank of British North America v. – – P. C. 307
Syers v. Syers – H. L. (E.) 174

T.

Telford, Lows v. – H. L. (E.) 415
Thorn v. London (Corporation of) – – – H. L. (E.) 120
Turnbull v. Owners of Ship "Strathnaver" – – P. C. 58

W.

Warden, Edwards v. H. L. (E.) 281

TABLE OF CASES CITED.

A.

		PAGE
Abbot *v.* Fraser	Law Rep. 6 P. C. 120	398
Adams, Ex parte	1 Rose, 305	200
Agra and Masterman's Bank, In re	Law Rep. 2 Ch. 391	485
Aldridge *v.* Johnson	7 E. & B. 885	719
Allison *v.* Bristol Marine Insurance Company	1 App. Cas. 229	748
Andrew *v.* Moorhouse	5 Taunt. 435	219
Anonymous	2 Show. 283	212
———	1 Salk. 246	416
———	Dyer, 305, pl. 59	417
———	1 Mod. 105	669
Appleby *v.* Myers	Law Rep. 1 C. P. 615; Ibid. 2 C. P. 651	125, 720
Arrowsmith's Trusts, In re	2 D. F. & J. 474	433
Ashton's Charity, Re	27 Beav. 115	105
Attorney-General *v.* Bouwens	4 M. & W. 171	480
——— *v.* Cambridge (Corporation of)	Law Rep. 6 H. L. 303	669
——— *v.* Colney Hatch Lunatic Asylum	Law Rep. 4 Ch. 146	395
——— *v.* Conservators of the Thames	1 H. & M. 1	665
——— *v.* Ironmongers' Company	Cr. & Ph. 208; 2 My. & K. 576; 10 Cl. & F. 908	117
——— *v.* Landaff (Bishop of)	Cited 2 My. & K. 586	117

B.

Bain *v.* Whitehaven Railway Company	3 H. L. C. 1	559
Ball *v.* Cross	1 Salk. 164	520
Barfold Estate Gold Mining Company *v.* Klingender	6 W. W. & A. B. 231 (Law)	41
Bass, Ex parte	36 L. J. (Bkcy.) 39	200
Baylis *v.* Dineley	3 M. & S. 477	87
Beckett *v.* Midland Railway Company	Law Rep. 3 C. P. 82	394
Bethell *v.* Abraham	Law Rep. 17 Eq. 24	433
Blackwood *v.* London Chartered Bank of Australia	Law Rep. 5 P. C. 110	708
Blakely Ordnance Company, In re	Law Rep. 3 Ch. 154	485
Blakey *v.* Dixon	2 B. & P. 321	217

		PAGE
Boldero *v.* East India Company	11 H. L. C. 405	286
Bond *v.* Gonsales	2 Salk. 445	500
Bouillon *v.* Lupton	15 C. B. (N.S.) 113; 33 L. J. (C.P.) 37	501
Brandao *v.* Barnett	12 Cl. & F. 787	487
Breadalbane Case	Law Rep. 2 H. L., Sc. 269	690
Bremner *v.* Hull	Law Rep. 1 C. P. 748	519
Bridge *v.* Grand Junction Railway Company	3 M. & W. 244	756
Bristol (Marquis of) *v.* Robinson	4 H. L. C. 1088	559
Brown *v.* McClintock	Law Rep. 6 H. L. 456	286
Buccleuch (Duke of) *v.* Metropolitan Board of Works	Law Rep. 5 H. L. 418	665
Burton *v.* Great Northern Railway Company	9 Ex. 507	258
Butcher *v.* Butcher	7 B. & C. 399	416
Byrne *v.* Schiller	Law Rep. 6 Ex. 20; Ibid. 319	223, 719

C.

Calvin's Case	4 Rep. p. 1	362
Campbell *v.* Hall	Cowp. 209; 20 State Trials, 239	369
Carter, Ex parte	2 Gly. & J. 233	198
——— *v.* Scargill	Law Rep. 10 Q. B. 564	719
Cassilis Peerage	Maidment's Report of, p. 45	5
Castle *v.* Playford	Law Rep. 7 Ex. 98	719
Catchpole *v.* Ambergate Railway Company	1 E. & B. 111	43
Chamberlain *v.* Crystal Palace Railway Company	2 B. & S. 605	684
Chamberlayne *v.* Brockett	Law Rep. 8 Ch. 206	106
Chapman *v.* Gwyther	Law Rep. 1 Q. B. 463	322
"Charlotte," The	3 W. Rob. 71	65
Chasemore *v.* Richards	7 H. L. C. 382	673
Cherry *v.* Mott	1 My. & Cr. 133	105
Christ's Hospital (Governors of), Ex parte	Law Rep. 8 Ch. 199	106
Churchward *v.* Reg.	Law Rep. 1 Q. B. 73	261
Clark *v.* Adie	21 W. R. 456	591
Clegg *v.* Edmonson	8 D. M. & G. 787	42
Clements *v.* Hall	24 Beav. 333; 2 De G. & J. 173	42
Collinge, Ex parte	4 D. J. & S. 533	198
Collins *v.* Barratt	10 B. Moo. 446	418
——— *v.* Martin	1 B. & P. 648	487
Cook *v.* Batchellor	3 B. & P. 150	418
Cory *v.* Patton	Law Rep. 7 Q. B. 304	719
Coryton *v.* Lithebye	2 Wms. Saund. 112	418
Craven *v.* Sanderson	7 A. & E. 880	520
Crouch *v.* Crédit Foncier	Law Rep. 8 Q. B. 374	483
Cutter *v.* Powell	6 T. R. 320	722
Czech *v.* General Steam Navigation Company	Law Rep. 3 C. P. 14	321

D.

Dalton *v.* Midland Railway Company	13 C. B. 474	43
Davies *v.* Jenkins	11 M. & W. 755	60
——— *v.* Mann	10 M. & W. 546	756

		PAGE
D'Arc *v.* London and North Western Railway Company	Law Rep. 9 C. P. 325	321
De la Chaumette *v.* Bank of England	9 B. & C. 208	558
De Pass' Case	4 De G. & J. 544; 28 L. J. (Ch.) 769	486
De Silvale *v.* Kendall	4 M. & S. 37	212
Diamond *v.* Lawrence	37 Pennsylvania Rep. 353	484
Dixon *v.* Bovill	3 Macq. 1	481
Doe *v.* Acland	2 B. & C. 779	368
Drinkwater *v.* Arthur	10 Supreme Court Rep. 193	86
Dungey *v.* London (Corporation of)	38 L. J. (C. P.) 298	391

E.

Eastern Counties Railway Company *v.* Dorling	5 C. B. (N.S.) 821; 28 L. J. (C. P.) 202	666
Ebsworth *v.* Alliance Marine Insurance Company	Law Rep. 8 C. P. 596	719
Edie *v.* East India Company	3 Burr. 1216; 1 W. Bl. 295	481
Edmonds, Ex parte	4 D. F. & J. 488	199
Ellis, Ex parte	2 Gly. & J. 312	200
—— *v.* Sheffield Gas Company	2 E. & B. 767	638
Elwin *v.* Elwin	8 Ves. 547	433
Emanuel *v.* Robarts	9 B. & S. 121	561
Emery *v.* Barclay	8 Supreme Court Rep. 374	86
"Evangelismos," The	12 Moo. P. C. 352; Swabey, 378	60

F.

Feather *v.* Reg.	6 B. & S. 257; 35 L. J. (Q.B.) 200	635
Fisher *v.* Dixon	5 Dunlop, 775	764
Ferrar *v.* Commissioners of Sewers of the City of London	Law Rep. 4 Ex. 227	391
Fisk *v.* Attorney-General	Law Rep. 4 Eq. 521	105
Fitzmaurice *v.* Bayley	9 H. L. C. 78	559
Flint *v.* Flemyng	1 B. & Ad. 45	250
Fordyce *v.* Brydges	2 Ph. 497	433
Forster *v.* Lawson	3 Bing. 452	418
Foster *v.* Pearson	1 C. M. & R. 849: 5 Tyr. 255	561
Foxwell *v.* Bostock	4 D. J. & S. 13; 12 W. R. 725	577
Frayes *v.* Worms	19 C. B. (N.S.) 159	229

G.

Galloway *v.* London (Corporation of)	Law Rep. 1 H. L. 34	669
Georgier *v.* Mieville	3 B. & C. 45	482
Gibson *v.* Brand	4 Man. & G. 179	638
Gilmour *v.* Supple	11 Moo. P. C. 551	720
Glencairn Peerage, The	Maidment's Report of, p. 45	5
Glyn *v.* Baker	13 East, 509	481
Governor and Company of British Plate Manufacturers *v.* Meredith	4 T. R. 794	391
Grant *v.* Vaughan	3 Burr. 1516	481
Gray *v.* Pullen	5 B. & S. 970	638
Grazebrook, Ex parte	2 Dea. & Ch. 186	198
Gurney *v.* Behrend	3 E. & B. 622	480

H.

		PAGE
Hagedorn *v.* Oliverson	2 M. & S. 485	719
Hall *v.* Janson	4 E. & B. 500	221
Hamilton (Duke of) *v.* Graham	Law Rep. 2 H. L., Sc. 166	704
"Harbinger," The	16 Jur. 729	60
Hargreaves, Ex parte	1 Cox, 440	198
Harrington *v.* Atherton	2 D. J. & S. 352	433
Harrison *v.* Stickney	2 H. L. C. 108	615
Hart *v.* Clarke	19 Beav. 349; 6 D. M. & G. 232; 6 H. L. C. 633	42
Harvey *v.* Brydges	14 M. & W. 442	426
Herries Peerage	3 Macq. 585	24
Hicks *v.* Shield	7 E. & B. 633	212, 719
Hole *v.* Sittingbourne and Sheerness Railway Company	6 H. & N. 488	638
Holmes *v.* Godson	8 D. M. & G. 152	433
Hopkinson *v.* Rolt	9 H. L. C. 555	750
Howbeach Coal Company *v.* Teague	5 H. & N. 151	43
Hutchin *v.* Mannington	1 Ves. 366	433

I.

Imperial Land Company of Marseilles, In re	Law Rep. 11 Eq. 478	486
"Iona," The	Law Rep. 1 P. C. 426	792
Ireland *v.* Livingstone	Law Rep. 5 H. L. 395	487
Irving *v.* Richardson	2 B. & Ad. 193	216
Iveson *v.* Moore	1 Ld. Raym. 491	394

J.

Jackson *v.* Isaacs	3 H. & N. 405	222
Johnson *v.* Archambault	8 Low. Can. Jur. 317	396
Jones *v.* Chapman	2 Ex. 803	416
—— *v.* Peppercorne	Joh. 430; 28 L. J. (Ch.) 158	486
—— *v.* Stanstead Railway Company	Law Rep. 4 C. P. 98	391
Joyce *v.* Swann	17 C. B. (N.S.) 84	719

K.

"Karnak," The	Law Rep. 2 A. & E. 289	212
Kearns *v.* Cordwainers' Company	6 C. B. (N.S.) 388; 28 L. J. (C.P.) 285	666
Keech *v.* Hall	Doug. 21	417
Kendal, Ex parte	Cited 1 Gly. & J. 382	200
King of Spain *v.* Machado	4 Russ. 225	496
Kirchner *v.* Venus	12 Moo. P. C. 361	212
Kish *v.* Cory	Law Rep. 10 Q. B. 553	322
Knight *v.* Gravesend, &c., Waterworks Company	2 H. & N. 6	124
Knight's Case	Law Rep. 2 Ch. 321	41
Knox *v.* Gye	Law Rep. 5 H. L. 656	286

L.

		PAGE
Lang *v.* Smyth	7 Bing. 284	482
Langton *v.* Higgins	4 H. & N. 402	719
Laugher *v.* Pointer	5 B. & C. 547	636
Lawrence's Case	Law Rep. 2 Ch. 412	41
Lindsay *v.* Janson	4 H. & N. 699	501
Lister *v.* Leather	8 E. & B. 1004	578
Lloyd *v.* Guibert	6 B. & S. 100	331
Lord *v.* Commissioners of Sydney	12 Moo. P. C. 473	665
Lucena *v.* Crauford	3 B. & B. 75; 2 N. R. 269	719
Lyons (Mayor of) *v.* East India Company	1 Moo. Ind. Ap. Ca. 175	103

M.

McCawley *v.* Furness Railway Company	Law Rep. 8 Q. B. 57	321
McIntyre *v.* Belcher	11 C. B. (N.S.) 764; 32 L. J. (C.P.) 254	260
Mackie *v.* Mackie	5 Hare, 70	433
Maclure, Ex parte	Law Rep. 5 Ch. 737	258
Manfield *v.* Maitland	4 B. & A. 582	213, 719
Marshall *v.* Ulleswater Company	Law Rep. 7 Q. B. 166	666
Martin *v.* Martin	Law Rep. 2 Eq. 404	433
Martineau *v.* Kitching	Law Rep. 7 Q. B. 436	719
Mashiter *v.* Buller	1 Camp. 84	218
Merry *v.* Nickalls	Law Rep. 7 Ch. 748; Ibid. 7 H. L. 545	87
Metropolitan Board of Works *v.* M'Carthy	Law Rep. 7 H. L. 243	394, 665
Meyer *v.* Dresser	16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289	483
Miller *v.* Race	1 Burr. 452	481
Mills *v.* Farmer	19 Ves. 483; 1 Mer. 99	105
Miner *v.* Gilmour	12 Moo. P. C. 131	665
Mitchell *v.* Jenkins	5 B. & Ad. 588	60, 418
——— *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 Q. B. 256	321
Moggridge *v.* Thackwell	7 Ves. 36	104
Moore, Ex parte	2 Gly. & J. 166	198
——— *v.* Great Southern and Western Railway Company	10 Ir. C. L. Rep. (N.S.) 46	684
Moxon *v.* Atkins	3 Camp. 200	500

N.

Naylor *v.* South Devon Railway Company	1 De G. & Sm. 32	43
Newman *v.* Cazalet	Park on Ins. 424, n. (a)	501
——— *v.* Warner	1 Sim. (N.S.) 457	433
Newton *v.* Harland	1 Man. & G. 644	418
Noble *v.* Kennoway	Doug. 510	500
Nolan *v.* Arabella Gold Mining Company	6 W. W. & A'B. 38 (Mining Ca.)	43
Norway *v.* Rowe	19 Ves. 144	42

O.

O'Connell's Case	11 Cl. & F. 155	751
Orme *v.* Pemberton	Cro. Car. 589.	523

P.

		PAGE
Parkes *v.* Stevens	Law Rep. 8 Eq. 350	591
Partridge *v.* Bank of England	9 Q. B. 396; Ibid. 421	482
———— *v.* Bere	5 B. & A. 604	416
Pechell *v.* Watson	8 M. & W. 691	418
Pelly *v.* Royal Exchange Assurance Company	1 Burr. 341	500
Peninsula and Oriental Company *v.* Shand	3 Moo. P. C. (N.S.) 272	331
Phène's Trusts, In re	Law Rep. 5 Eq. 346	433
Pickard *v.* Sears	6 A. & E. 469	42, 490
Piers *v.* Piers	2 Cl. & F. 331	689
Piggott *v.* Pearblock	4 Moo. P. C. 399	617
Pordage *v.* Cole	1 Wms. Saund. 319 h.	562
Prendergast *v.* Turton	1 Y. & C. (Ch.) 98; 33 L. J. (Ch.) 268	42
"Princess Alice," The	3 W. Rob. 138	63
Princess of Wales *v.* Liverpool (Earl of)	1 Sw. 114; 3 Sw. 507	141

R.

Reg. *v.* Darlington School (Governors of)	6 Q. B. 682	74
—— *v.* Hurstbourne Tarrant	E. B. & E. 246	615
—— *v.* Manchester Railway Company	4 E. & B. 103	74
—— *v.* St. Michael's, Southampton	6 E. & B. 807	615
Re Penney	7 E. & B. 669	680
Rex *v.* Bristol Dock Company	12 East, 428	669
—— *v.* Carpenter	6 A. & E. 794	615
—— *v.* Dursley (Churchwardens of)	5 A. & E. 10	616
—— *v.* Else	Buller's Nisi Prius, 76	591
—— *v.* London Dock Company	5 A. & E. 163	669
—— *v.* Marsh	5 A. & E. 468	519
—— *v.* Millis	10 Cl. & F. 534	751
—— *v.* Nantwich	16 East, 228	520
—— *v.* North Riding of Yorkshire (Justices of)	6 A. & E. 863	520
—— *v.* Russell	6 East, 427	669
—— *v.* St. Michael's, Pembroke	5 A. & E. 603	616
—— *v.* Warren	Cowp. 370	523
Ricket *v.* Metropolitan Railway Company	Law Rep. 2 H. L. 175	392, 669
Roberts *v.* Brett	11 H. L. C. 337	562
———— *v.* Bury Improvement Commissioners	Law Rep. 4 C. P. 755; Ibid. 5 C. P. 310	125
Robinson *v.* Mollett	Law Rep. 7 H. L. 802	483
Rose *v.* Groves	5 Man. & G. 613	665
Rowbotham *v.* Wilson	8 H. L. C. 360	703
Rugg *v.* Minet	11 East, 210	749

S.

St. Barbe, Ex parte	11 Ves. 413	199
Saunders *v.* Drew	3 B. & Ad. 445	220
Schmidt *v.* Garden Gully Company	4 Australian Jurist, 63	41

		PAGE
Seagrave *v.* Union Marine Insurance Company	Law Rep. 1 C. P. 305	719
Secretary of State for India in Council *v.* Kamachee Boye Sahaba	7 Moo. Ind. Ap. Ca. 476	351
Senhouse *v.* Christian	19 Beav. 356, n.	41
Sillitoe, Ex parte	1 Gly. & J. 74	200
Smart *v.* Hyde	8 M. & W. 723	322
Smartle *v.* Williams	1 Salk. 246	416
Smith *v.* City of Boston	7 Cush. 254 (Massachusetts Cases)	392
——— *v.* Weguelin	Law Rep. 8 Eq. 212	495
Sparkes *v.* Marshall	2 Bing. N. C. 761	719
Sparling *v.* Parker	9 Beav. 525	433
Spynie Peerage	Maidment's Report of, p. 45	5
Stead *v.* Heaton	4 T. R. 669	519
Stephens *v.* Australasian Insurance Company	Law Rep. 8 C. P. 18	216
Stirling *v.* Maitland	5 B. & S. 840	259
Sutherland Peerage	Maidment's Report of, p. 45	5

T.

Tamvaco *v.* Simpson	Law Rep. 1 C. P. 363.	225
Tanjore Case	7 Moo. Ind. Ap. Ca. 529	361
Taubman *v.* Pacific Steam Navigation Company	26 L. T. (N.S.) 704	321
Taunton *v.* Costar	7 T. R. 431	416
Taylor *v.* Taylor	8 Hare, 120	305
Toms *v.* Wilson	4 B. & S. 442	321
Topping, Ex parte	4 D. J. & S. 551	198
Torre *v.* Brown	5 H. L. C. 555	305
Tuff *v.* Warman	5 C. B. (N.S.) 573; 27 L. J. (C. P.) 322	756
Turley *v.* Bates	2 H. & C. 200	719

U.

Union Bank of Manchester, Ex parte	Law Rep. 12 Eq. 354.	43
United States *v.* Wagner	Law Rep. 2 Ch. 582	141
Unwin *v.* Wolseley	1 T. R. 674	484

V.

Vallance *v.* Dewar	1 Camp. 503	500
Vanheath *v.* Turner	Winch. 24	485
Varlo *v.* Faden	27 Beav. 255; 1 D. F. & J. 211	433
Vickers *v.* Hertz	Law Rep. 2 H. L., Sc. 113	485
Vyse *v.* Foster	Law Rep. 7 H. L. 318	198

W.

Walker *v.* Bartlett	18 C. B. 845; 25 L. J. (C. P.) 263	486
——— *v.* Walker	5 Madd. 424	433

		PAGE
Walton *v.* London and Brighton Railway Company	1 Har. & Ruth. 421	756
Warder *v.* Horton	4 Binney, Pennsylv. 529	721
Watson *v.* Russell	3 B. & S. 34	561
——— *v.* Shankland	Law Rep. 2 H. L., Sc. 304	225
Webb *v.* Shaftesbury	7 Ves. 480	433
Westcott, Ex parte	Law Rep. 9 Ch. 626	197
Whitlock *v.* Underwood	3 B. & C. 157	561
Widdowson *v.* Duck	2 Mer. 494	433
Williams *v.* Jerratt	5 B. & A. 32	561
Withy *v.* Mangles	10 Cl. & F. 215	559
Wookey *v.* Pole	4 B. &. A 1	481
Woollaston's Case	4 De G. & J. 437	42

Appeal Cases

BEFORE

THE HOUSE OF LORDS

AND

THE JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

[BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.]

H. L. (Sc.)
1875
Feb. 25.

THE MAR PEERAGE.

CLAIM OF THE EARL OF KELLIE.

OPPOSING PETITION OF JOHN FRANCIS ERSKINE GOODEVE ERSKINE.

Scotch Earldom—Circumstantial Evidence.

Queen *Mary's* creation of the Earldom of *Mar* in 1565 proved by a long train of circumstantial evidence.

General Rule as to the Descent of Peerages—Presumption in favour of Heirs Male.

Per LORD CHELMSFORD:—Upon a review of all the circumstances of the case, I have arrived at the conclusion that the determination of it must depend solely on the effect of the creation of the dignity by Queen *Mary* and on that alone: and there being no charter or instrument of creation in existence, and nothing to shew what was to be the course of descent of this dignity, the *primâ facie* presumption of law is that it is descendible to heirs male, which presumption has not in this case been rebutted by any evidence to the contrary. I am, therefore, of opinion that the dignity of Earl of *Mar* created by Queen *Mary* is descendible to the heirs male of the person ennobled, and that the Earl of *Kellie*, having proved his descent as such heir male, has established his right to the dignity.

Per Lord Redesdale:—I presume that the Committee will accept Lord *Mansfield's dictum* in the *Sutherland Case* as the ruling principle in this claim. On that occasion he said: "I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir male, always open to be contradicted by the heir female upon evidence shewn to the contrary. The presumption in favour of heirs male has its foundation in law and in truth." (1)

There is nothing in the evidence before us to contradict that presumption; and I therefore consider that the Earl of *Kellie* has made good his claim to the Earldom of *Mar* created by Queen *Mary*.

Per The Lord Chancellor (2):—It is clearly made out that the title of *Mar* which now exists was created by Queen *Mary* sometime between the 28th of July and the 1st of August, 1565; and the only question in the case is whether that peerage so created by Queen *Mary* should be taken to be, according to the ordinary rule, a peerage descendible to male heirs only, or whether it should be taken to be a peerage descendible to heirs general. Now the *primâ facie* presumption being in favour of heirs male, there is absolutely nothing which can be taken to be evidence in any way countervailing that *primâ facie* presumption.

The burden of proof lies upon the opposing Petitioner, and it not having been in any way discharged, I am compelled to arrive at the conclusion that this must be taken to be a dignity descendible to heirs male, and therefore that it is now vested in the Earl of *Kellie*.

Qualification as to the Descent of Earldoms and other Territorial Dignities.

Per Lord Chelmsford:—In the competition between *Bruce* and *Baliol* for the crown of *Scotland*, the assessors appointed by King *Edward*, in answer to questions put to them, stated that "earldoms in the kingdom of *Scotland* were not divisible, and that if an earldom devolved upon daughters, the eldest born carried off the whole in entirety," thus speaking of a descent to females as a possible event. Lord *Mansfield*, therefore, in the *Cassilis Case* (3), uses language too unqualified in saying of earldoms and other territorial dignities, that they "most certainly descended to the issue male."

THE claim of the Earl of *Kellie* praying the Queen to admit his succession to the honour and dignity of Earl of *Mar*, in the Peerage of *Scotland*, and to adjudge and declare that he was entitled thereto, was presented by royal command to the House of Lords;

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(1) Maidment's Report of the *Sutherland Case*.

(2) Lord *Cairns*.

(3) Maidment's Report of the *Cassilis Case*.

and was by the House, on the 23rd of May, 1867, referred to their Lordships' Committee for Privileges.

On the 17th of July, 1868, the petition of *John Francis Erskine Goodeve Erskine* was presented to the House for leave to appear in opposition to the Earl of *Kellie's* claim.

The case came before the Committee for Privileges in the session of 1868, when the petitioner, the Earl of *Kellie,* was represented by Mr. *Fleming,* Q.C., and Mr. *Balfour,* of the Scotch Bar. The opposing petitioner had for his counsel Sir *Roundell Palmer,* Q.C., Mr. *Maidment,* of the Scotch Bar, and Mr. *Holland. The Attorney-General, The Lord Advocate,* and Mr. *Badenoch Nicholson,* appeared for the Crown.

In the session of 1870 Mr. *Gordon,* Q.C., and Mr. *Fleming,* Q.C., appeared for the Earl of *Kellie*; the opposing petitioner being represented by Sir *Roundell Palmer,* Mr. *Maidment,* and Mr. *Holland; The Attorney-General, The Lord Advocate,* Mr. *Young,* Q.C., and Mr. *Sellar* for the Crown.

Counsel were also heard in 1871 and 1872. In 1873 Mr. *Gordon,* Q.C., and Mr. *Fleming,* Q.C., appeared for the Earl of *Kellie;* the opposing petitioner being represented by Mr. *A. G. Marten* and Mr. *Holland.* For the Crown *The Attorney-General, The Lord Advocate,* and Mr. *Sellar.*

In 1874 the Earl of *Kellie* was represented by Mr. *Gordon,* Q.C., and Mr. *Fleming,* Q.C.; the opposing petitioner having for his counsel Mr. *Marten,* Q.C., Mr. *V. Hawkins,* and Mr. *T. E. Holland; The Attorney-General, The Solicitor General for Scotland,* and Mr. *Badenoch Nicholson* appearing for the Crown.

On the 25th of February, 1875, the same counsel as in the preceding session being present, Lord *Chelmsford,* addressing the Committee, delivered the following opinion:—

LORD CHELMSFORD:—

My Lords, the claim of the Petitioner to the dignity of Earl of *Mar* is involved in some difficulty, in consequence of the evidence being extremely voluminous, and in its construction and effect being in parts in no inconsiderable degree doubtful. It is easy to state the question shortly, upon the determination of which the establishment of the claim must ultimately depend, viz., whether Queen *Mary*, in conferring the dignity on Lord *Erskine*, in 1565, meant to restore a former dignity or to create a new one simply, or to give to the newly-created dignity the same course of succession as belonged to the ancient one. But, in order to arrive at a satisfactory conclusion, it is necessary not only to examine the circumstances connected with the dignity in early times, but also to consider many of the matters occurring subsequently to its creation in 1565, which may tend to throw light upon the question of the disputed succession.

It seems to be proved with sufficient clearness that *Mar* was originally a territorial dignity, and that the Earls of *Mar* were of the number of seven earls of *Scotland* who at an early period of the history of that kingdom possessed some undefined pre-eminence over others of a similar rank. It was denied by the opposing Petitioner that the dignity was territorial in the sense of being a dignity by tenure, or dependent upon the seizin of the lands. But, as far as we can trace its early history, we find the dignity and the lands always enjoyed by the same person. From the first Earl of *Mar* eleven male descents took place, interrupted by two apparent intruders upon the succession (no relationship being traceable between them and the descendants of the first earl), who, with the possession of the lands, assumed the title of Earl of *Mar*, the dispossessed earls resuming the title upon repossessing themselves of the lands. Whatever, therefore, may have been the exact nature of the tie between the dignity and the lands, it is evident that at the beginning they were not separable, or at least not actually separate from each other.

This, however, is a matter of less importance than the question how the dignity or the dignity with the lands was originally descendible. Although it is probable that in limiting lands connected with, or which carried a dignity with them, they would be granted by preference to male heirs, there is no reason to believe that in such cases females were always excluded. In the competition between *Bruce* and *Baliol* for the crown of *Scotland*, the assessors appointed by King *Edward*, in answer to questions put to them, stated that "earldoms in the kingdom of *Scotland* were not divisible, and that if an earldom devolved upon daughters, the eldest born carried off the whole in entirety," thus speaking of a descent to females as a possible event. Lord *Mansfield*, therefore, in the *Cassilis Case* (1), uses language too unqualified in saying of earldoms and other territorial dignities, that they "most certainly descended to the issue male."

The fact of there having been a continued lineal descent of males from the first earl down to Earl *Thomas*, the last of the male line before Queen *Mary's* charter, by no means removes one of the great difficulties in the case, which is to ascertain in what right *Margaret*, the sister of Earl *Thomas*, and, after her, her daughter *Isabella*, had successively possession of the earldom or *comitatus*, and respectively assumed the title of Countess of *Mar*. *Margaret*, in her brother *Thomas's* lifetime, had married *William*, the first Earl of *Douglas*, which dignity he acquired after the marriage. He assumed the title of Earl of *Douglas* and *Mar*. The latter of these titles belonged to him in right of his wife if she were Countess of *Mar* by inheritance, and she bore that title both before and after her husband's death.

But, on the other hand, the question is embarrassed by the fact that *William*, Earl of *Douglas*, upon two or three occasions dealt with the lands of *Mar* as in his own right. In the matter of the terce of *Margaret* the widow of Earl *Thomas* out of the lands of *Mar* and *Garioch*, which she assigned for an annuity to the Earl and *Margaret* his spouse, and the longer liver and the heirs (not of both the spouses, but) only of the Earl, the Earl alone warranted, for himself, his spouse, and his heirs, the dowager's re-entry into the lands in default of payment of the annuity. If the Earl had held the earldom in right of his wife, the warranty, without her joining in it, would of course have been invalid. Again, shortly after Earl *Thomas's* death, on the 26th of July, 1377, Earl *William* held a court for his Earldom of *Mar* at *Kildrummy*, and accepted a resignation of certain lands in the earldom, and re-granted them to hold of him and his heirs. And on the 10th of August in the same year Earl *William* confirmed a grant

(1) Maidment's Report of the *Cassilis*, *Sutherland*, *Spynie*, and *Glencairn Peerages*, p. 45.

of lands in *Mar* by Earl *Thomas*, and warranted that grant for himself and his heirs.

To account for these acts of dominion by Earl *William* it was suggested, on the part of the opposing Petitioner, that there must have been a new charter of the Earldoms of *Mar* and *Douglas* granted to him. The evidence to warrant this suggestion is of the most meagre description No charter of creation has been discovered, but in the *Douglas* charter chest, folded up in a notarial copy of a charter granted by *Isabella*, styling herself Lady of *Mar*, and her husband *Malcolm*, Lord *Drummond*, to *George*, Earl of *Angus*, the following memorandum was found :—" Memorandum (either for or from) y^{e} Register is 102 Roull contening 25 chart granted be King *Robert* the 2nd wherein there is ain charter granted to *W*^{m}. Earl of *Douglas* and *Mar*, concesse." This word "*concesse*" is difficult to understand, and no satisfactory explanation of it was afforded us during the argument. If, as suggested, it means "granted," it is altogether superfluous and an unmeaning repetition. There is nothing in the memorandum to shew what was the subject of the charter, which, for anything that appears, although in favour of the Earl of *Douglas* and *Mar*, may have been a grant of something wholly unconnected with the earldom or *comitatus* of *Mar*. At all events, I do not think that this loose memorandum can be accepted as any proof that there had been a resignation of the earldom into the king's hands, and a re-grant following upon it, of which resignation not a trace appears.

There are further difficulties surrounding the question of the foundation of the title of *Margaret* to the Earldom of *Mar*. She survived her husband *William*, Earl of *Douglas*. If she had been Countess of *Mar* in her own right, *James*, her son, must have waited for the succession till it opened to him by her death. But on the death of his father he assumed the title of Earl of *Mar*, and by that title, in the lifetime of his brother, confirmed a charter granted by his father. *Margaret* survived her son, who was killed in the battle of *Otterburne*. She afterwards married *John Swynton*, who, if she were Countess of *Mar* by descent, would by the law of *Scotland* have become Earl of *Mar* in her right. But in a bond made by them in 1389, he is styled "*John Swynton*, Lord of *Mar*," and she "*Margaret*, his spouse, Countess of *Douglas* and *Mar*." It cannot be alleged that he did not assume the dignity because he was not in possession of the lands, for his possession of the lands was stated by the counsel for the opposing Petitioner as the reason why he called himself Lord of *Mar*.

Such is the perplexity in which the first alleged instance of the descent of the dignity of *Mar* in the female line is left. It renders it not altogether improbable that there may have been some new destination of the earldom or *comitatus*, although no record of any such destination can now be found. This presumption is in some degree strengthened by the circumstances accompanying the possession of *Isabella*, the daughter of *Margaret*, which is founded upon by the opposing Petitioner as evidence of a second descent of the dignity in the female line. *Isabella* married Sir *Malcolm Drummond*, whose sister was the queen of *Robert* III. He never assumed the title of Earl of *Mar*, but was always styled "Sir *Malcolm* of *Drummond*," or "Sir *Malcolm* of *Drummond*, Lord of *Mar*," or "Lord of *Mar* and *Garioch*." And although *Robert* II., in charters granted in 1397, styled *Isabella* in one Countess of *Mar*, and in another Countess of *Mar* and *Garioch*, yet it is remarkable that till the year 1403 she never called herself Countess of *Mar*, but only Lady of *Mar* and *Garioch*.

After the death of *Drummond*, *Isabella* married *Alexander Stewart*, an illegitimate son of the Earl of *Buchan*, brother of King *Robert* III. The dealings with the earldom or *comitatus* before and after this marriage demand particular attention Taking the case of the opposing Petitioner to be correct, that *Isabella* had the Earldom of *Mar* by descent, she, on the 12th of August, 1404, by charter styling herself Countess of *Mar* and *Garioch*, granted by reason of a contract of marriage, the Earldom of *Mar* and *Garioch* to *Alexander Stewart*, and the heirs to be begotten between them, whom failing to the heirs and assigns of *Alexander*. This charter was recognised and relied upon as valid in a proceeding in 1457 held for the purpose of inquiring into the validity of a retour of service of *Robert*, Lord *Erskine*, as heir to a moiety of the Earldom of *Mar*, to which I shall have occasion to advert more particularly hereafter.

Upon the marriage of *Alexander Stewart* with *Isabella* a new charter was granted, which was preceded by the following ceremony:—*Alexander Stewart,* in the presence of witnesses before the castle of *Kildrummy,* "did present and deliver up to the Lady *Isabella* the whole castle of *Kildrummy,* with all the charters and evidences of the same, and all the keys of the said castle, so that she could freely, without any hindrance, of her free will, dispone with all her lands, the castle and all things being in the same and her body; which having been done, the said Lady *Isabella* held the keys in her hand, and with deliberate advice chose the said *Alexander* for her husband, and gave to the same in free marriage the said castle with the appurtenances, the Earldom of *Mar* with the tenants of the same, the Lordship of *Garioch,* and other baronies and lordships, to have and to hold to the said *Alexander* and to the longer liver of them, and the heirs to be begotten between them, whom perchance failing, to the lawful heirs of the said lady." This ceremony was immediately followed by a charter dated the 9th of December, 1404, by *Isabella,* styling herself Countess of *Mar* and *Garioch,* by which, reciting that first having settled a solemn and careful treaty, she granted, and by that charter confirmed, to *Alexander Stewart* in free marriage the Earldom of *Mar* and castle of *Kildrummy,* the Lordship of *Garioch,* &c., to hold to him and the heirs between him and herself begotten, whom failing, to her lawful heirs on either side. [It is difficult to understand how, after the charter of the 12th of August, 1404, in which the ultimate destination of the earldom or *comitatus* is to *Alexander Stewart,* his heirs and assigns, *Isabella* had any power to grant the charter of December without a re-grant to her, to which the ceremony preceding the marriage, called in the charter a treaty, can hardly amount.

A good deal of controversy arose as to the proper translation of the *habendum* in this charter of December. The words of the ultimate destination are "*hæredibus nostris legitimis ex utrâque parte semper reservatis liberis tenementis.*" The opposing Petitioner contended that the words "*ex utrâque parte*" are applicable not to the heirs but to the lands on both sides, which it was said was clear from a former part of the charter in which *Isabella* confirmed to *Alexander Stewart* "all right and claim which we have in any lands soever unjustly detained from us, *tam ex parte patris quam* *ex parte matris.*" The words "*ex utrâque parte*" were interpreted by the Lords of Session in an action brought by the Earl of *Mar* against Lord *Elphinstone* in 1624 to mean that "Dame *Isabella Douglas* ordained that the lands which fell to her on her father's side in case of her decease without children of her own body should pertain to her nearest and righteous heirs upon her father's side, and that the lands which fell to her by her mother should in case foresaid pertain to her nearest and righteous heirs on her mother's side." This construction of the words (which appears to me to be correct) is necessary to be maintained by the opposing Petitioner, as he derives his title from *Isabella* who, as he alleges, took by descent from her mother *Margaret*.

The charter of *Isabella*, of December, 1404, was confirmed by a charter of King *Robert* III. stating the final destination of the lands to be to "the lawful heirs of *Isabella*, but omitting the words "*ex utrâque parte*;" from which it was inferred either that the king thought the words applied to the lands and did not affect the destination, or that he advisedly rejected them from his confirmation.

The subsequent dealings with the earldom or *comitatus* may render the questions which arise upon this charter of December, 1404, wholly immaterial.

Isabella died in 1407, and *Alexander Stewart*, who survived her, lived till 1435. During his wife's life he bore the title of Earl of *Mar* and *Garioch*, and after her death by the same title he dealt with the lands of the earldom. In 1426 King *James* I. confirmed a charter granted by *Alexander Stewart*, Earl of *Mar* and *Garioch*, to *Alexander de Forbes* of the lands of *Glencarure* and *Le Orde*, the *habendum* of the charter being, "to have and to hold of us and our heirs, successors or assigns, Earls of *Mar*." On the 28th of May, 1426, a most important dealing with the earldom took place; King *James* I. by charter, reciting that *Alexander Stewart*, Knight, and his natural son *Thomas Stewart*, Knight, had of their free will resigned into the hands of the king all the right and claim of themselves and their heirs to the Earldom of *Mar* and Lordship of *Garioch*, granted "all and whole the said earldom and lordship to be held by *Alexander* for the whole time of his life, and after his decease to *Thomas* and the heirs male of his body, whom failing

H. L. (Sc.)
1875
MAR PEERAGE.

to revert freely to us and our heirs." It nowhere appears what right *Thomas* had in the lands. It will be observed that in the charter *Alexander* is called *Alexander Stewart*, Knight, from which it may be inferred that the dignity was connected with the lands, and that when a person holding a territorial dignity resigned the lands into the hands of the king to receive a new grant, between the times of the resignation and the re-grant he ceased to be a peer. This is rendered probable from the fact that King *James* shortly before this charter, and in the same year 1426 (as already mentioned), confirmed a charter of *Alexander Stewart*, Earl of *Mar* and *Garioch*, and a few months after the charter again styled him Earl of *Mar*, and in a subsequent charter of the same king he is mentioned as having sat in Parliament under that title.

From all the foregoing circumstances I think it may fairly be assumed that down to the death of *Alexander Stewart*, in 1435, the dignity of *Mar* continued to be territorial, at least in the sense of its not being enjoyed separately from the lands.

Thomas Stewart died without heirs in the lifetime of his father. On the death of *Alexander Stewart*, Earl of *Mar*, the earldom or *comitatus* was considered to have reverted to the Crown under the charter of 1426, and thereby the territorial dignity ceased to exist. At all events there were no Earls of *Mar* with an acknowledged title between the time of the death of *Alexander* and the charter of Queen *Mary* in 1565, a period of nearly 140 years, except some occasional grants of the dignity in the interval.

While the lands of *Mar* were thus in the hands of the Crown it dealt with them, and also with the dignity. In 1466 *James* II. granted the earldom and the dignity of Earl of *Mar* and *Garioch* to his son, Prince *John Stewart*. The prince sat in Parliament as Earl of *Mar*, and it is worthy of notice that Lord *Erskine*, the common ancestor of the contending parties, frequently sat with him in the same Parliament. In 1482 the King granted the Earldom (*i. e.*, the lands) of *Mar* and *Garioch* to his brother the Duke of *Albany* and the heirs whomsoever of his body, the charter being witnessed by Lord *Erskine*. The Duke was "fore faulted" and escaped to *France*, upon which the Crown took possession of the lands and retained possession of them till 1562, a period of eighty years. The Duke died in *France*, and his son *Alexander* became Duke of *Albany* and afterwards Regent of *Scotland*, and was acknowledged by the then estates of the realm to possess (amongst other titles) that of Earl of *Mar* and *Garioch*. I cannot understand in what right he could have assumed this title. His father is not stated to have had any grant of the dignity, and if it belonged to him as necessarily accompanying the grant of the lands, it could not descend to his son, as at the time of his father's death the lands were in the hands of the Crown. Besides thus granting the dignity of Earl of *Mar*, the Crown from time to time made grants of considerable portions of the *Mar* lands, thus severing them from the earldom or *comitatus*, and thereby, as it was contended, breaking it up and preventing the possibility of restoring the territorial dignity in its integrity.

It is natural to ask what was done by the Lords *Erskine* (from whom both the Petitioner and the opposing Petitioner derive title) during the long interval when the Crown was conferring the dignity and dealing with the lands of *Mar* at its pleasure, to the prejudice of their assumed right to the succession which opened to them, as it is alleged, on the death in 1407 of *Isabella*, Countess of *Mar*, without issue. I have already adverted to the fact that in 1466 the Lord *Erskine* of that day sat in Parliament with an Earl of *Mar* created by King *James* II., and that he also was a witness to a royal charter of the Earldom of *Mar* in prejudice of his hereditary claim. And it appears most conclusively that the Lords *Erskine* never at any time claimed the entire Earldom or *comitatus* of *Mar*, to which alone (if at all) the dignity could be joined, but invariably limited their claim to one half of the earldom or *comitatus*, and never asserted any right to the dignity itself. In 1390, during the life of *Isabella*, a supplication was presented to the King in Parliament by *Thomas*, Lord *Erskine*, stating that if *Isabella* should die without issue, his wife, formerly *Janet Barclay*, would be entitled to one half part of the Earldom of *Mar* and Lordship of *Garioch*, and praying the King not to confirm any contract in relation to the lands to the prejudice of the rights of his wife. It is unnecessary to inquire into the nature of the title of *Janet Erskine*, my object in noticing this proceeding being to shew that from the very first the claim of the *Erskines* was confined to one half of the earldom.

H. L. (Sc.)
1875
MAR
PEERAGE.

After the death of *Alexander Stewart*, Earl of *Mar*, in 1435, when, as already observed, the dignity of Earl of *Mar* practically, at least, ceased to exist, Sir *Robert Erskine*, in April, 1438, obtained a retour of himself as heir of *Isabella*, Countess of *Mar* and *Garioch*. The circumstances connected with this and a subsequent retour of the same year lay them open to a good deal of observation. Soon after the death of *Alexander Stewart*, as a preparatory to these judicial proceedings, Sir *Robert Erskine* and his son entered into an agreement with Sir *Alexander Forbes*, the sheriff-depute of *Aberdeen*, before whom the proceedings for a retour would be held, to secure his services in their favour (covered with the decent pretext of his doing all his business and diligent care to help and and to further them with his advice and counsel) by a grant to him of certain lands in *Mar* so soon as they should be recovered out of the King's hands. At this time Sir *Robert Erskine* claimed as co-heir or co-parcener with Lord *Lyle*. In this retour of April, 1438, the jury found that "Sir *Robert* is the lawful nearest heir of the Lady *Isabella* of one-half of the lands of the Earldom of *Mar* and Lordship of *Garioch* which are in the hands of the King by reason of the death of *Alexander Stewart*, who held the lands by gift of the Lady *Isabella* for the term of his life." This retour is false in fact, for the lands were not in the hands of the King on the death of *Alexander Stewart*, who held under the gift of Lady *Isabella* for his life, but were claimed and possessed by the Crown by reason of the reversion in the charter of 1426, which vested in possession on the death of *Alexander*.

In the month of October, 1438, Sir *Robert Erskine* obtained another retour as to one-half of the Earldom of *Mar*, upon which some controversy arose. On the part of the opposing Petitioner it was asserted that this was a retour of the other half of the earldom, though without explaining why, if Sir *Robert Erskine's* claim was to the whole of the lands of *Mar*, there should have been separate retours of the two halves, there not being a shadow of evidence that he had acquired the other half after the April retour. On the other side it was urged, with great probability, that the October retour was obtained to correct the former one, which had erroneously found that Sir *Robert* had right to half of the Lordship of *Garioch*, which at that time was held by *Thomas*

Stewart's widow. And it was said that infeftment not being taken till November, it could not apply to the April retour, because it was beyond six months after the date of the precept of infeftment by virtue of that retour, and, by the rule in force at that time, such infeftment would have been too late. And, notwithstanding this second retour, it will be found that many years afterwards Lord *Erskine* persisted in his claim to only half of the earldom.

Pursuing the inquiry as to the conduct of the *Erskines* during the period when no one held the dignity of Earl of *Mar*, it appears that after the retours of 1438, *Robert*, Lord *Erskine*, in two or three private charters styled himself Earl of *Mar;* but after a proceeding in 1457, to which I shall presently refer, there is no evidence of any of the Lords *Erskine* having assumed that title. But all of them, from *Robert* the first to *John* the sixth lord, sat in Parliament by their title of Lord *Erskine*, and not one of them claimed to possess the higher dignity.

After Sir *Robert Erskine* had, not improbably by means of the purchased assistance of the sheriff depute, succeeded in obtaining in 1438 a retour as heir to *Isabella*, he seems to have got possession of some part of the lands of *Mar*, for on the 10th of August, 1440, the King (being then under age) and his council, in order (as it was said) to preserve the peace of the kingdom, entered into an agreement with Sir *Robert*, then Lord *Erskine*, under which he was permitted to retain the castle of *Kildrummy*, holding it on behalf of the King until the King should come of age and then to be delivered to the King, and Lord *Erskine* was then to make and establish his claim before the King and the Three Estates. And it was further agreed that the fruits and revenues of one-half of the Earldom of *Mar* which Lord *Erskine* claimed as his property should be received by him until the judgment were had, he being accountable for them in case judgment should be given against him, and for the King. This agreement proves that the claim of Lord *Erskine* continued to be to one-half of the earldom only, notwithstanding the two retours of 1438, by which it was asserted he obtained service as heir to the whole. On the 22nd of May, 1449, the King, by letters under his privy seal, directed Lord *Erskine* and his son Sir *Thomas Erskine* to deliver up the castle of

Kildrummy to persons named, and it seems to have been delivered up accordingly.

Nothing was done towards obtaining a judgment upon Lord *Erskine's* claim to one-half of the Earldom of *Mar* until the year 1457, when proceedings were taken against some of the jurors who sat upon the inquest of 1438 for an unjust deliverance of the retour upon such inquest. The delinquent jurors begged pardon of the King, and were pardoned. Then the following proceeding took place. The King with the Chancellor and Lords passed into the town-hall (of *Aberdeen*) for justice to be done to Lord *Erskine* with respect to his claim of the lands of the Earldom of *Mar*. An inquest was chosen. Lord *Erskine* alleged that the deceased *Robert*, Lord *Erskine*, his father, had last died vested and seised as of fee of half of the Earldom of *Mar*, and that he was the heir of his father. Issue was taken upon this allegation, the Chancellor answering that although Lord *Erskine* was heir of his father he was not heir to the said lands, and that the lands were in the hands of the King as his own property. Lord *Erskine*, in support of his claim, produced the charter of *Isabella* of the 9th of December, 1404, granted upon her marriage with *Alexander Stewart*; in answer to which the Lord Chancellor, on behalf of the King, publicly produced a certain charter of taillie of the deceased *Isabella* of a date preceding the date of the other charter" (being *Isabella's* charter of the 12th of August, 1404) "made to the deceased *Alexander*, Earl of *Mar*, her husband, and the heirs lawfully begotten or to be begotten of his body" (the true destination being "to the heirs to be begotten between them") "whom failing to the lawful heirs of *Alexander* whomsoever." By virtue of that charter the Chancellor declared the King the true heir and lawful possessor of the said lands, *Alexander* having died a bastard vested and seised as of fee of the said Earldom of *Mar*, and the King being lawful heir by reason of bastardy. The jurors retoured that *Robert*, Lord *Erskine*, did not die seised of the half of the lands of the Earldom of *Mar* claimed by him, and that the said lands were in the hands of the King by reason of the death of the late King.

In this proceeding for questioning the claim of Lord *Erskine* to one half of the Earldom of *Mar* no mention is made of the charter of the 28th of May, 1426, under which the King became entitled to the reversion of the Earldom of *Mar*, and took possession of it on the death of *Alexander Stewart*, his son *Thomas Stewart* having died in his father's lifetime without issue. Whether this arose from any doubt as to the validity of this charter, or whether Lord *Erskine*, having relied upon the charter of *Isabella* of December, 1404, it was thought sufficient to shew that she had disabled herself from making it by her having granted the earlier charter of August, 1404, I am unable to form an opinion.

Thus matters stood for more than one hundred years, when, in the year 1561, Queen *Mary* revived the title of Earl of *Mar* by granting the earldom, together with the dignity, to her natural brother *James* (afterwards the Regent *Murray*) and his heirs male. He sat on the council as Earl of *Mar;* Lord *Erskine*, who was his uncle, sitting with him upon several occasions. He subsequently resigned the dignity and the lands of *Mar*, and was created Earl of *Moray*.

I have thought it necessary to go fully into the history of the dignity prior to Queen *Mary's* charter, because it appears to me that it may materially assist in determining the question of the limitation of the dignity to which the Petitioner lays claim.

On the 5th of May, 1565, being about six weeks before Queen *Mary's* charter, and not improbably with a view to it, *John*, the sixth Lord *Erskine*, procured himself, by a general retour, to be served heir to his ancestor, *Robert*, the first Lord *Erskine*, who is styled *Robert*, Earl of *Mar* and *Garioch* and Lord *Erskine*. It has been already shewn that although *Robert*, the first Lord *Erskine*, in some private deeds called himself Earl of *Mar*, he never publicly assumed that title. And it is a significant fact that, although Queen *Mary* acted upon this retour and recited it in her charter, she did not adopt the description of *Robert* as Earl of *Mar*, but changed it to *Robert*, Lord *Erskine*, as if refusing to recognise his right to the higher dignity.

In examining Queen *Mary's* charter, which is dated the 23rd of June, 1565, it must be borne in mind that it does not relate in any way to the dignity of Earl of *Mar*, but only to the earldom or *comitatus*, which is described as containing the lands of *Strathdone*, *Bramar*, *Cromare*, and *Strathdee*, and is granted, together with the Lordship of *Garioch*, to *John*, Lord *Erskine*, his heirs and assigns. It is clear that this could not have been the ancient earldom or *comitatus* with which the dignity was originally connected, because it no longer existed in its entirety, part of the lands having been severed from it and vested in strangers, and other part having been annexed to the Crown by Act of Parliament.

The charter contains recitals which if the slightest inquiry had been made would have been ascertained to be false. For instance, it is stated that *John,* Lord *Erskine,* was retoured as lawful heir of *Robert,* Lord *Erskine,* the heir of *Isabella* in respect of the earldom; whereas his service was a general service as heir, and of course without application to the lands; and if it had been a special service, he could not have been found heir to more than half of the earldom, which was all that *Robert,* Lord *Erskine,* ever claimed. Again, the charter recites, in strong terms, that *John,* Lord *Erskine,* had the undoubted hereditary right to the earldom, lordship, and regality, notwithstanding his predecessors were unjustly kept out of possession of the same. Now, in addition to the fact of the claim of the *Erskines* having been invariably confined to half of the earldom, if either the charter of the 12th of August, 1404, or that of the 28th of May, 1426, was valid (and there is nothing, apparently, to impeach either of them), the possession of the Crown was by title and not by usurpation. At this time, also, the solemn adjudication against the claim of Lord *Erskine* to one half of the earldom upon the inquest held in 1457 had not been in any degree impeached. And the alleged "undoubted hereditary right" had been allowed to slumber during the whole of the long period of the Crown's possession of the lands.

The charter, singularly enough, contains two distinct and separate grants of the earldom or *comitatus.* One founded upon the restoration of an inheritance of which the grantee's predecessors had been unjustly deprived, and also upon their good services to the Queen's predecessors; the other expressed to be "for good and faithful services," without more. An explanation of this double grant was suggested in argument founded upon what Lord *Mansfield* said in the *Cassilis Case* (1), viz., "Charters pass *periculo petentis.* Many lands are inserted in charters to which the grantee has no title; nothing can pass by such right." Therefore it was said, that as the first grant in the charter was founded upon an allegation of a title which the grantee never possessed, it was liable to challenge on that ground, and out of abundant caution the grant on account of services alone was added.

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(1) Maidment, p. 53.

As already observed, Queen *Mary's* charter contains nothing with respect to the dignity of *Mar.* This, I think, was not disputed in the argument, and it is proved by the fact that the charter being of the date of the 23rd of June, the grantee sat almost daily in the council from the 8th to the 28th of July as Lord *Erskine*, and appeared at the board for the first time as Earl of *Mar* on the 1st of August. He must, therefore, have obtained the dignity by creation in some other way than by charter before this day. The question arises when and how did this creation take place? There is no writing or evidence of any kind to assist us. It was suggested, with great probability, that Queen *Mary's* marriage with Lord *Darnley* having taken place on the 30th of July, and Lord *Erskine* having sat in the council by his old title of *Erskine* on the 28th of July, and as Earl of *Mar* on the 1st of August, he must have been created an earl upon the occasion of the marriage, and by a ceremony well known in those days called "belting." To this it was objected, that according to the remarks of Lord *Hailes* upon the *Spynie Case* (1), this ceremony could only take place in Parliament; and that if this was the manner of the creation, some record of it would have appeared. But Lord *Loughborough*, in the *Glencairn Case* (2), proved that Lord *Hailes* was in error in limiting, as he did, the place of the ceremony of "belting," for he mentioned three cases of the creation of earls by belting elsewhere than in Parliament.

Whether Lord *Erskine's* creation was in this particular form and manner seems to me not to be very material. It is certain that he must have been created Earl of *Mar* about the time of the Queen's marriage; and as no record of the creation is in existence, the limitation of the dignity must be left to the ordinary presumption of law, unless there is something in the case to rebut this

(1) Maidment, p. 11.

(2) Maidment, p. 16.

presumption. Lord *Mansfield*, in the *Sutherland Case* (1), said: "I take it to be settled, and well settled, that where no instrument of creation or limitation of the honour appears, the presumption of law is in favour of the heir male, always open to be contradicted by the heir female upon evidence shewn to the contrary;" and a similar statement of the presumption in favour of the heir male was made by Lord *Loughborough* in the *Glencairn Case* (2). The *primâ facie* presumption, therefore, is that the dignity of *Mar*, created by Queen *Mary*, is descendible to heirs male.

But, on the part of the opposing Petitioner, it was argued that various circumstances in the case tend to rebut the presumption, and to establish not the probability merely (that would not be enough), but clear proof that the title is descendible to heirs female.

What was chiefly relied upon as indicating the intention of the Queen either to restore the old dignity of *Mar*, which was said to be descendible to females, or that, if she created a new dignity, she meant it to descend in the same channel of limitation, is the language of that part of the charter in which the Queen states that she was moved by conscience to restore the earldom to the rightful heirs from whom it had been unjustly detained, and that, acting from this motive, she restored the lands to the grantee, his heirs and assigns. And it was argued that the dignity being revived about the same time as the charter, the Queen must have intended to create the dignity with similar limitations, in order that it might never be separated from the lands. This, however, is pure conjecture. There is nothing in the charter to point to the intentional or probable revival of the dignity, and it is not at all a necessary conclusion that because the Queen was desirous of giving back the lands of *Mar*, which she was prevailed upon to believe had been unjustly withheld from Lord *Erskine* and his predecessors, she therefore contemplated reviving a dignity which had not been practically in existence for nearly 140 years, and granting it with a limitation to heirs and assigns. Even if the intention to connect the lands with a dignity about to be created can be assumed, there was no necessity to make the limitations correspond, because, by giving the lands to the person ennobled, his heirs and assigns, he would have the power of directing the succession to the lands in the same line as the descent of the dignity. And the power of alienation by the grantee of the lands disposes of the suggestion as to the Queen's intention that the dignity and the lands should never be separated. The reasoning on this subject is altogether speculative, and at the utmost raises nothing more than the very slightest probability.

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(1) Maidment, p. 9.

(2) Maidment, p. 7.

A strong inference against this presumption of the limitation of the dignity, so as to extend to heirs female, may, I think, be derived from the fact (already mentioned) that, only four years before the charter in question, the Queen, when giving the same dignity of *Mar* to her brother, limited it strictly to his heirs male.

In adverting to the case of the opposing Petitioner where it relies upon matters which occurred after Queen *Mary's* charter, I cannot see in any of them evidence in support of the descent of the dignity for which he contends. Great stress was laid upon an Act of Parliament passed in 1587, which ratified the charter. This Act, however, has no greater force and effect than the charter itself. *Erskine*, writing upon parliamentary ratifications of grants made by the Crown in favour of particular persons, says, in his Institutes (1): "Ratifications by their nature carry no new right; they barely confirm that which was formerly granted, without adding any new strength to it by their interposition." The Act, therefore, cannot give any efficacy to the charter which it did not previously possess, and it does not, any more than the charter, affect, or pretend to affect, the dignity.

The dignity appears at first to have been claimed as depending solely upon the creation by Queen *Mary*, for the new earl sat in the council, and was ranked as the junior earl. Again, in two commissions issued by the Crown in relation to matters in Parliament, when, as Lord *Loughborough* said in the *Glencairn Case* (2), "A due precedency would probably be given to the several noblemen," the Earl of *Mar* is named as junior earl. I am not disposed to lay any stress upon the order of precedence prior to the decreet of ranking, because I cannot discover any uniform practice as to the placing of the Earls of *Mar* in Parliament previously.

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(1) Book I., title 1, sect. 39.

(2) Maidment, p. 17.

This decreet of ranking was issued on the 5th of March, 1606. It stated that, considering and remembering the great contentions and differences which many times occurred and fell out amongst the nobility of *Scotland* with relation to their precedence and priority in ranking and voting in Parliament, His Majesty had appointed a commission consisting of the nobility and council to convene and call before them the whole noblemen of the kingdom, and according to their productions and verifications of their antiquities to set down every man's rank and place."

Under this commission each nobleman, in order to establish his precedence, offered to the commissioners such evidence of his title as he chose, their power being necessarily limited to the verification of the documents produced, and to forming their judgment upon them, and they having no means of knowing whether anything was withheld from them which would affect the order of precedence founded upon the proof presented. Therefore their decision is entitled to no weight in the investigation of a claim to a title which depends upon facts not laid before them.

The Earl of *Mar*, in support of his title to precedence, produced to the Lords Commissioners the charter of Dame *Isabel*, Countess of *Mar*, of the 9th of December, 1404, and the King's charter of confirmation; the Act of Parliament of 1587, and an extract of a retour of the 20th of March, 1588, whereby *John*, Earl of *Mar*, was served nearest and lawful heir to Dame *Isabel Douglas*, Countess of *Mar*. The relationship to *Isabel* found by this retour is thus traced. She was a grand-daughter of *Donald*, Earl of *Mar*, who was the brother of *Helen* of *Mar*, who was the great-grandmother of *Robert*, who was the grandfather of *Alexander*, the great grandfather of *John*, the earl whose claim to precedence was in proof. No records of the ancient dignity, and nothing prior to the charter of December, 1404, were produced to the commissioners. *Isabel's* charter of the 12th of August, 1404, seems to have been purposely kept from them. The finding of the commissioners that *John*, Earl of *Mar*, was heir to *Isabella*, through *Helen* of *Mar*, was erroneous in a double sense. He could not have been heir to *Isabella*, who was heir to *Margaret*, the law of *Scotland* not allowing heirship to be traced through the mother, and he could not legally claim by heirship of blood to *Helen*, as by the same law there is no succession to land upwards through females (1).

By the decreet of ranking, the remedy of reduction was reserved to all who should find themselves prejudiced by their ranking. And in 1622 an action for reduction of the retour of the 20th of March, 1588, was brought by six earls, who, under the decreet, were ranked below the Earl of *Mar*. In searching through the voluminous evidence, I have not been able to find any account of the result of this action of reduction, which however shews that the claim of precedence by the Earl of *Mar*, founded upon the retour of 1588, was not suffered to go unchallenged.

During the whole of the inquiry as to the ranking of the Earl of *Mar*, whose claim to precedence was founded on his right of succession to the ancient dignity, but the proof of which went no further back than the year 1404, the Lords Commissioners were in ignorance of the charter of resignation of *Alexander Stewart* and his son *Thomas* to the King, and the re-grant to them in 1426, and that the claim of the Earl of *Mar* to this ancient dignity had been allowed by his predecessors to remain dormant for nearly 140 years, while they had acquiesced in the Crown conferring the dignity of Earl of *Mar*, and granting the lands connected with it to persons in no way related to the possessors of that dignity. Had the Commissioners been furnished with this information, there can be little doubt that they would have determined the precedence of the Earl of *Mar* by reference to the creation of the dignity by Queen *Mary*.

The proceedings of the six earls to reduce the retour of 1588, by which the Earl of *Mar* was served heir to *Isabella Douglas*, Countess of *Mar*, seem to have stimulated his activity to obtain some further support to his claim of precedence. Accordingly, on the 22nd of January, 1628, he procured no fewer than five retours finding him heir respectively to *Donald*, Earl of *Mar*, to *Gratney*, Earl of *Mar*, to *Donald*, Earl of *Mar*, the son of *Gratney*, to *Thomas*, Earl of *Mar*, the son of *Donald*, and to *Margaret*, the sister of

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(1) *Erskine's* Institute, book III., title 8, sects. 9 & 10.

Thomas and mother of *Isabella.* If these retours prove nothing else, they shew how easily retours could be procured, and how little reliance can be placed upon them. Retour jurors are usually chosen on account of their supposed knowledge of the facts upon which the service as heir to the person last feudally vested depends. But these five retours were taken in respect of alleged heirship to persons who had died feudally vested from 250 to 350 years before. Whatever value may be supposed to belong to these retours, which of course found only the fact of heirship generally, and determined nothing more than the existence of that relation with the several persons named, they can have no effect whatever upon the question whether the succession to the dignity of Earl of *Mar* was open to an heir female. It may be observed that the judicial proceeding of service of heirs does not apply to honours and dignities. And it may fairly be asked why, in his claim of precedence before the Commissioners founded upon his title to the ancient dignity, the Earl of *Mar* did not bring forward the proof of his heirship to the predecessors of *Isabella,* upon which he afterwards obtained these retours.

The opposing Petitioner, to establish that the descent of the dignity was in the female line, relied upon the Act of the 5 Geo. 4, for the reversal of the attainder and the restoration of the dignity.

John, the sixth Earl of *Mar,* was attainted in the year 1715. His relations purchased the forfeited estates. After selling the *Mar* estates, they settled the *Erskine* estates upon *Thomas,* Lord *Erskine,* the only son of the attainted Earl, and the heirs male of his body, whom failing, upon the heirs female of his body, whom failing, upon Lady *Frances Erskine,* the daughter of the attainted Earl, and the heirs male of her body, whom failing, upon the heirs female of her body, whom failing, upon *James Erskine,* the brother of the attainted Earl, and the heirs male of his body.

Thomas, the son of the attainted Earl, died without issue. Lady *Frances* then succeeded under the destination in the settlement. She married *James Erskine,* who eventually became the eldest surviving son of her uncle *James,* the brother of the attainted Earl. Lady *Frances* died in 1776, and her husband in 1785. Their son

John Francis Erskine then became both heir male and heir of line of *John*, Lord *Erskine*, upon whom Queen *Mary* conferred the dignity of Earl of *Mar*.

The Act restoring *John Francis Erskine* and all entitled after him to the honours, dignities, and titles of Earl of *Mar*, recites that he is the grandson and lineal representative of *John*, Earl of *Mar*. He was the grandson of *John* Earl of *Mar*, through his mother, Lady *Frances Erskine*. Upon this fact the counsel for the opposing Petitioner argued that it was intended by the Act to restore the dignity to the person entitled as the lineal representative of the attainted Earl, and as the person restored was only lineally descended from *John*, Earl of *Mar* through a female, it amounted to a parliamentary recognition that the dignity before the attainder was descendible to females.

There is not, in my opinion, a shadow of foundation for this argument. The intention of the Act was to restore *John Francis Erskine* to the dignity. He was undoubtedly the nearest in blood in succession to the attainted Earl, and he had a preferable claim to every other person to be restored. The recital in the Act that he is the grandson and lineal representative of the attainted Earl is an accurate description of his title without reference to the course of descent by which it was derived. There was not the slightest occasion to make any inquiry as to the succession to the restored title, and probably none was made. It was enough to restore the dignity to whatever person was best entitled to it, and when restored it would as a necessary consequence be subject to the course of descent which was incident to it before the attainder. My Lords, upon a review of all the circumstances of the case I have arrived at the conclusion that the determination of it must depend solely on the effect of the creation of the dignity by Queen *Mary* and on that alone: that whether the original dignity was territorial or not, or was or was not descendible to females, is wholly immaterial, inasmuch as it had in some way or other come to an end more than a century before Queen *Mary's* time: that the creation of the dignity by her was an entirely new creation: and there being no charter or instrument of creation in existence, and nothing to shew what was to be the course of descent of this dignity, the *primâ facie* presumption of law is that it is descendible to heirs male, which presumption has not in this case been rebutted by any evidence to the contrary.

I am, therefore, of opinion that the dignity of Earl of *Mar* created by Queen *Mary* is descendible to the heirs male of the person ennobled, and that the Earl of *Kellie*, having proved his descent as such heir male, has established his right to the dignity.

THE CHAIRMAN OF THE COMMITTEE FOR PRIVILEGES (1):—

My Lords, the ancient Earldom of *Mar* was probably held by tenure of the *comitatus.* The earldom we have to decide on is the peerage independent of the *comitatus*, and it is important and necessary, in considering this case, to treat the peerage and *comitatus* separately.

The inquiry may be said to commence with *Gartney*, Earl of *Mar*, who died before 1300. From his son *Donald* the peerage and *comitatus* descended in direct succession to *Thomas*, the last heir male. From *Gartney's* daughter *Helen*, the *Erskines* claim to be his heirs on the extinction of the female representative of *Donald* in *Isabella*, niece to *Thomas*, in 1407. There is no record of the creation of this ancient earldom, and I presume, therefore, that the Committee will accept Lord *Mansfield's dictum* in the *Sutherland Case* as the ruling principle in this claim. On that occasion he said: "I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir male, always open to be contradicted by the heir female upon evidence shewn to the contrary. The presumption in favour of heirs male has its fundation in law and in truth" (2). Is this presumption of law contradicted by the female in this, as it was successfully in the *Sutherland* claim? In that case it was shewn that the peerage descended to *Elizabeth* the wife of *Adam Gordon* on the death of her brother without issue in 1514 as heir of the body of *William* who was Earl of *Sutherland* in 1275, that it was assumed by her husband, and from her had descended to the heirs male, who were heirs of her body, to the death of the last earl in 1766 without any objection on the part of the male line of the said *William*. Thus a continuous and undisputed succession to the heir female was shewn from 1514 to 1766, a period of 252 years, while there was a male line to contend for the earldom in existence had the descent been limited to males.

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(1) Lord *Redesdale.*

(2) Law Rep. 2 H. L., Sc. 258; *Herries Peerage*, 3 Macq. 585.

In the case before us it appears to me that the opposing Petitioner asks the Committee to adopt the reverse of Lord *Mansfield's* dictum, and to hold that the presumption of law is in favour of the heir female. The force of the evidence before us is against his claim unless we allow it to be constantly overruled by such a presumption.

On the death of *Thomas*, Earl of *Mar*, the last heir male, *William*, Earl of *Douglas*, the husband of his only sister *Margaret*, was called Earl of *Douglas* and *Mar*. He may have assumed the latter title for one or other of three reasons; as being in possession of the *comitatus*—in right of his wife's succession to the peerage as heir general, or by a new creation. There is the clearest evidence that at that time it might have been allowed to him in courtesy only, as holding the *comitatus*. His daughter *Isabella*, called herself Countess of *Garioch* in the surrender of the *comitatus* of *Mar* to her husband, *Alexander Stewart*, and in the Crown charter confirming the same she is called Countess of *Mar* and *Garioch*. There cannot be a doubt that in her *Garioch* was only a lordship. The opposing Petitioner, to whom the point is of vital importance, does not pretend to assert that it was a peerage earldom, and though the Earl of *Douglas* may for a time have claimed the Earldom of *Mar*, there is evidence which makes it doubtful whether, under whatever claim he may have first assumed the title on his brother-in-law's death, he always continued to assert that claim and to use the title. In the Scotch Roll of *Richard* II. (1377), he is Earl of *Douglas* and *Mar*. In those of February, 1381, and March, 1383, he is Earl of *Douglas* only, and though he is called Earl of *Douglas* and *Mar* in 1383, it is only when mentioned as a witness in two royal charters. These are the only documents in which he is called Earl of *Mar* after 1381, and in the only two charters of his wife after that date, while she calls herself Countess of *Douglas*, she styles herself only Lady of *Mar* and *Garioch*, putting these latter titles on a par and as inferior to that of *Douglas*. Her late husband being called Earl of *Douglas* only, in the charter, together with her own change in title, is a very significant fact. The importance of this distinction between the titles of countess and lady will be noticed hereafter.

Did Earl *Douglas* become Earl of *Mar* in right of his wife's succession to the peerage as heir general to her brother? There is no evidence whatever of the title having been recognised as a peerage while held by *William*, who lived to 1384, or by his son *James*, who called himself Earl of *Douglas* and *Mar* in 1388 in a charter, and Earl of *Douglas* only in another charter of about the same, or perhaps rather earlier date. He fell at *Otterburn*, in 1388. The period of ten or twelve years is not a long one, and proof of parliamentary recognition of a peerage in those days is not of very frequent occurrence; but we must not forget that the presumption of law is against *Margaret's* inheriting the peerage, and so far as there is evidence before us there is none that she, or her husband, or her son, were ever in possession of it. It is further to be observed that the ancient Earldom of *Mar* was many centuries older than that of *Douglas*, and yet it was always placed after it, and that when after the Earl's death she married *John of Swynton*, he became, even after the death of her son, Lord of *Mar* only, and never was Earl of *Mar*. It is important also to notice, that in all the contemporary documents in evidence a countess peeress is always a countess. The widow of *Thomas*, Earl of *Mar*, is Countess of *Mar* and *Angus*, not Lady of *Angus*, like the Countess of *Douglas* and Lady of *Mar*. The Countess of *Angus* too, though so in her own right, always puts *Mar* before *Angus* as the more ancient title, both in her being peerages.

The evidence before us, shews clearly that when a peerage was attached to a *comitatus*, the holder of it was earl, and when a peerage was not attached, lord only. In the charter of *Robert* I., granting to his brother *Edward Bruce* "*totum Comitatum de Carrick*," he is made an earl by the following words: "*cum nomine, jure et dignitate Comitis.*" He died without legitimate issue. In the same page a charter of *David* II. grants to *William de Conynghame*, "*totum comitatum de Carrick*" without those words, and in a charter of this *William de Conynghame* he is "*Dominus de Carrick*" only. The case of *Garioch* affords similar evidence. In *Isabella's* charter, she, calling herself Countess of *Mar*, but only Lady of *Garioch*, confirms a charter of *David*, formerly Earl of *Garioch*, brother to King *William*. *David* had only one son who died without issue, and the peerage earldom became extinct, and although *Isabella* usually, when she called herself Countess of *Mar* called herself also Countess of *Garioch*, there cannot be a doubt that on the extinction of the peerage *Garioch* became in law a lordship only, and that in dealing with the lands which she had inherited she assumed no higher title, though confirming the act of her predecessor, an Earl of *Garioch*. The same is to be observed in her charter, and in that of *Alexander* her husband, confirming the same after the marriage, in which he calls himself Earl of *Mar* and Lord of *Garioch* only.

To prevent the Committee from attaching the importance to the use of the title of lady which these facts disclose, Mr. *Hawkins* contended that it was the proper one in dealing with the lands of the *comitatus*. It is only necessary to refer to the charters of *Thomas*, Earl of *Mar*, and of *William*, Earl of *Douglas* and *Mar*, and to that of the Earl of *Wigton*, to shew that where the holder of a *comitatus* was an earl he used that title only in dealing with the lands.

Did *William*, Earl of *Douglas*, become Earl of *Mar* by a new creation? There is no evidence of such creation. The Lord Advocate, as counsel for the Earl of *Kellie*, called the attention of the Committee to a memorandum, in which a charter is mentioned granting to *William*, Earl of *Douglas*, the Earldoms of *Douglas* and *Mar* "*concesse*," as having been with other documents in a roll of twenty-five charters of *Robert* II. But as the charter itself is not forthcoming, it is impossible for the Committee to accept the memorandum as evidence that it was a new creation of the Peerage Earldom of *Mar*. Moreover, the great inaccuracy of the description in the memorandum of the contents of the notarial copy of the charter in which it was found, renders it of little value, except as proving that a charter of *Robert* II. relating to the Earldom of *Mar* as connected with *William*, Earl of *Douglas*, was once in existence, but has since the date of that memorandum (1400) been lost or destroyed, to which fact I shall refer hereafter. Probably the charter referred to the *comitatus* only, the word "*concesse*," which is not of any certain interpretation, appearing to me most likely to mean "surrendered." *Margaret's* son *James* calling himself Earl of *Mar* in her lifetime in the charter before referred to, was quoted in favour of a new creation; but his styling himself Earl of *Douglas* only in other charters is against it. The former is probably the latest in date, and he may have assumed the title if his mother had then surrendered the *comitatus* to him, which she may have done after her second marriage. *John* of *Swynton* is not Lord of *Mar*, as witness to the charter of *James*, but is so in the obligation in 1389 after his death.

Margaret died in 1390, and was succeeded in the *comitatus* by her only daughter *Isabella*, and in the peerage earldom, if such was in existence. She was the wife of *Malcolm Drummond*. In November, 1390, probably after *Margaret's* death, he is *Malcolm de Drummond*, Knight, in a license from the Crown to build a tower at *Kindrocht*, in *Mar*. Probably, as *John de Swynton* was Lord of *Mar* in right of his marriage with *Margaret*, *Malcolm* was unable to assume that title till some arrangement was come to about it. In March, 1391, the King confirms a grant from *Malcolm de Drummond*, Knight, to *John de Swynton*, Knight (neither calling himself Lord of *Mar* in this transaction) of 200 marks annual rent, and in 1393 in a royal charter which granted £40 sterling annually to *Malcolm*, he is called Lord of *Mar*, and he bore that title till he died, before March in 1402. He is proved, therefore, to have been about twelve years husband to *Isabella* after her succession to the *comitatus*, and yet he never became Earl of *Mar*. He is Lord of *Mar* and *Garioch*, and she Lady of *Mar*, *Garioch*, and *Liddisdale*, in the important charter of the 19th of April, 1400, cited in the notarial copy of it, which is the only charter in evidence made by her in his lifetime. He evidently did not allow her to call herself countess, because she was not entitled to the peerage, which if she had been would have made him earl. He was nearly related to the King, who had married his sister, and was in favour, as is proved by the before-mentioned grant. Under these circumstances, the evidence afforded by the above-mentioned charter of 1400 is conclusive against a continuous succession to the peerage earldom.

In the first charter after *Drummond's* death, she still calls herself Lady of *Mar* and *Garioch*. In a charter of the 13th of March, 1403, she is Countess of *Mar* and Lady of *Garioch*. In the following year she and her castle were taken forcible possession of by *Alexander Stewart*, the natural son of the Earl of *Buchan*, third son of *Robert* II., and brother to King *Robert* III. Without entering into particulars, with which the Committee must be familiar, on the 9th of November, 1404, she surrendered the *comitatus* to him, calling herself Countess of *Mar* and *Garioch* "*in purâ et liberâ viduitate*," and the same day gave him seisin thereof, and, no longer a widow "*elegit in Maritum*" in the presence, among others, of the Bishop of *Ross*, who probably was there for the purpose of performing the marriage ceremony. These charters were confirmed by the King calling her Countess of *Mar* and *Garioch*, and the succession to the *comitatus* was thereby settled on herself and her husband and the longest liver of them, and to the heirs to be then procreated between them, whom failing, to her heirs. These charters related to the territorial *comitatus* only.

Many years after, in 1430, *Alexander* is shewn to have sat in Parliament as Earl of *Mar*. Did he assume that title immediately after his marriage? We have evidence before us that this was not the case. From the *Forbes* charter chest a receipt from him has been produced, dated the 2nd of January, 1405, as Lord of *Mar* and *Garioch* only, nearly a month after he had seisin of the *comitatus*. Soon after, however, he assumed the title of earl. But in order properly to understand this point, and others which follow it, it becomes necessary to enter into the history of *Scotland* at the time, which I am surprised was not more referred to than it was by the counsel on either side.

Robert III. was a man of weak character, and a sickly constitution. His brother, the Duke of *Albany*, in fact ruled, and is charged with having imprisoned and starved to death the King's eldest son, with the purpose of acquiring the crown. *Robert*, in order to save his only remaining son *James*, then about nine years old, from a similar fate, resolved to send him to *France*, but the ship in which he sailed was taken by the English, and the child sent to *London*, and kept there by *Henry* IV., who refused to give him up. This caused his father great grief, and he died on the 4th of April, 1406, when the Duke of *Albany* became Regent, and the country fell into a sad state of anarchy. What evidence have we of *Alexander's* transactions during that period? The Regent was his uncle. On the 6th of April and the 6th of September, 1406, he had letters of safe conduct from *Henry* IV. as *Comes de Mar, de Garioch, de Scotia,* and on the 11th of December, in the same year, as ambassador, and on the 29th of December, on his return from *France.* Those documents prove how he was trusted and employed by his uncle, as arbitrary and unscrupulous a man as himself. That he should be allowed to call himself Earl of *Mar* and *Garioch* under such authority can be easily accounted for.

The Regent was dead before the King's return to *Scotland,* but some evidence of the character of his acts is afforded by the memorandum from the Exchequer Roll in 1456, from which it appears that he had accepted a surrender of the *comitatus* of *Mar* from *Alexander,* whom the Chamberlain calls "*Assertus Comes de Mar*" (self-called Earl of *Mar*), and granted it to him and his natural son *Thomas* and his heirs. The King, on his arrival, summoned a Parliament in 1424, and commenced active proceedings in regard to the illegal acts done during his minority and absence. *Murdo,* Duke of *Albany,* son to the Regent, was tried by his peers and executed; and *Alexander,* no doubt apprehensive of the questions which might be raised as to the surrender and re-grant of the *comitatus* under the Regent, made terms with the King.

Thus we come to the surrender and re-grant of 1426, when the King confirmed to *Alexander* and *Thomas* the *comitatus* which they surrendered to him (thus acknowledging the validity of what had been done under the Regent) and re-granted it to them, and to *Thomas's* heirs male, failing whom with remainder to the Crown. This latter condition was probably rewarded by a grant of a peerage earldom, with remainder to *Thomas.* The policy pursued by the King after his return from *England,* and which ultimately cost him his life, was to increase the territorial influence of the Crown, and to reduce that of the nobles, and this reversion to the lands of *Mar* on the death of a youth of perhaps a weak constitution, for he died before his father, was well worth a peerage concession. And we find the first and only proof of *Alexander's* sitting in Parliament in the charter of *James* I. in 1429. He died in 1435, and his natural son *Thomas* having died before him, the *comitatus* under the settlement of 1426 lapsed to the Crown.

In considering what then occurred, we must again refer to the state of *Scotland. James* I. had so offended and alarmed the nobility by his acts, that some of them conspired against him, and he was murdered in 1437. His son was a minor, and there was a regency. In 1438 *Robert*, Lord *Erskine*, got himself served heir to *Isabella* in half the *comitatus*, and notwithstanding the remainder to the Crown in *Alexander's* settlement of 1426, got possession of that half, as will be hereafter shewn. In 1440 we find him calling himself Earl of *Mar*, but sitting in Parliament as Lord *Erskine*. Mr. *Hawkins* says, "The Crown kept him out of the earldom." Is it credible that a Regency, the result of a rising against the late King, whose acts against the aristocracy the nobles were determined to resist, could have prevented such a man as Lord *Erskine* from taking a seat in Parliament to which he had lawfully succeeded? If the ancient earldom was in existence as descendible to heirs general, he had a right to it as heir to Earl *Gartney*. Every peer had an interest in the question of such a succession, and late events had proved that they were not so weak, or the Crown so strong, as to render such a refusal possible. Lord *Erskine* was not the man, nor in the position, to be so treated. Look at the agreement in 1440, in which the King, with the advice of his council, delivers the castle of *Kildrummy* to him, and allows that "the revenues of half the Earldom of *Mar*, *which Lord Erskine claims as his own*, shall *remain* with him till the Crown allows him a sufficient fee for keeping the castle," or, in other words, gives him something in exchange for them. It is clear from this document that Lord *Erskine* was, under the retour of 1438, in possession of half of the lands of the *comitatus* which the Crown claimed under *Alexander's* charter, but which the Regency was unable to get from him, and which probably remained with the *Erskines* until the retour of 1438 was set aside in 1457. It must also be noticed that the ancient peerage, if in existence, descended to him independently of the *comitatus* as heir general of *Gartney*, and that the claim of the Crown to the *comitatus* was based on acts done in relation to it by *Isabella* and her husband, in no way to be affected by Lord *Erskine's* possession of the peerage.

As regards the assumption by him of the title of Earl of *Mar*, we find that in all the documents in which he so styles himself he invariably adds Lord *Erskine*, evidently knowing that under the latter designation alone he could act legally. The charter of *James* II. is conclusive on this point. In it a charter is recited of *Robert*, Earl of *Mar*, Lord *Erskine*, granting certain lands to *Andrew Culdane* in 1440, which the King confirms in 1449, as a charter of *Robert*, Lord *Erskine*. In 1452 the ancient earldom was treated by the King as extinct, for he created his son Earl of *Mar*; and the royal power was similarly exercised on subsequent occasions, and *Robert's* successors, none of whom ever assumed the title of Earl of *Mar*, continued to sit as Lords *Erskine*, sometimes with newly created Earls of *Mar*, and sometimes without any such bar to their claiming the title.

This undisputed admission of the extinction of the peerage by the Crown under six sovereigns, and by six Lords *Erskine* in succession, from the death of *Alexander* in 1435 to the grant by Queen *Mary* in 1565, a period of no less than 130 years, must be looked upon as a settlement of the question which it would be very dangerous to disturb. Our decision should be governed in a great degree by that which was held to be the law at the time, which appears to confirm the *dictum* of Lord *Mansfield*, and to have considered the ancient earldom to have become extinct on failure of heirs male.

The argument in support of the grant of the earldom by Queen *Mary* in 1565 being a restoration, and not a new creation, must be next considered. The last preceding grant of the *comitatus* was by that Queen to her natural brother *James* by charter in 1562, in which a right to a seat in Parliament was specially provided, thereby proving (if it were necessary to do so) that the *comitatus* did not then confer a peerage. *James* surrendered both in the same year, sitting as Earl of *Mar* on the 10th of September, and as Earl of *Moray* on the 15th of October. On the 23rd of June, nearly three years afterwards, the Queen granted the *comitatus* to Lord *Erskine* in a charter in which she acknowledged him to be heir to *Isabella*, and that he and his ancestors had been

H. L. (Sc.)
1875
Mar Peerage.

unlawfully deprived of the *comitatus*. Still he continued to sit as Lord *Erskine*, as is proved by the records of *sederunt* in the Privy Council, in which he is found as Lord *Erskine* on the 28th of July, more than a month after he had been declared by the Crown heir to *Isabella*. Stronger proof cannot be required to shew that there was no earldom for him to succeed to through her. On the 1st of August he is in the council as Earl of *Mar*. Between those days the Queen's marriage took place, and without accepting *Randolph's* letter as evidence, common sense tells us that he was created Earl of *Mar* on that occasion. If it was thought necessary that some course should be taken to prevent any idea of the restoration of the old peerage, none could be devised more decided than insisting on time being allowed to intervene between the restoration of the *comitatus* to him as heir to *Isabella* and his recognition as earl.

Taking all these circumstances into consideration, I am of opinion that the earldom which *John*, Lord *Erskine* of the 28th of July, is recorded to have enjoyed on the 1st of August, 1565, was a new creation and probably by charter. Why that instrument is not now forthcoming I will discuss hereafter.

In support of the opinion that at a later period the ancient peerage was held to be extinct, I would refer to the documents lodged by the Earl of *Mar* in 1606 for the decreet of ranking. These were the surrender by *Isabella* in 1404, and the re-grant to herself and *Alexander* and to her heirs, and the confirmation thereof by *Robert* III.; a letter from that king to Sir *Thomas Erskine* in 1390, promising that he would not recognise any resignation of the *comitatus* to his prejudice; and the Act of Parliament of 1585, which ratified the grant of the *comitatus* by Queen *Mary*. All these documents related to the territorial earldom only. No records of the ancient peerage were produced, and the ranking sought was confined to whatever might have been granted in 1404, which would give a precedence of 161 years over that given by Queen *Mary* in 1565. Mr. *Hawkins*, in answer to a question why earlier documents were not produced, said that the Earl probably produced the earliest Crown charters he could find, and that, as far as he was aware, there were no earlier documents on the *Mar* title, omitting to notice the Acts of Parliament, in which *Donald*, Earl of *Mar* in 1283 is mentioned, and *Thomas*, *Isabella's* uncle, in 1369—public documents as accessible to the Earl on that occasion as for the present inquiry.

The ranking sought for was obtained, and a necessity thereupon arose for destroying all records which would, if discovered and produced at any future period, take away that precedence. If the charter referred to in the memorandum before mentioned granted a Peerage Earldom of *Mar* to *William*, Earl of *Douglas*, and his heirs male by *Margaret*, or if, as is more probable, it dealt with the *comitatus* in a manner adverse to its having a peerage attached to it, it might be fatal to the ranking obtained through the production of *Isabella's* charter of 1404, and the destruction of the deed is thus accounted for. If *Alexander* had obtained a grant of peerage in 1426 to himself, with remainder to his natural son, or an earlier one to himself and his heirs male or general by *Isabella*, the production of either would upset the ranking obtained by means of the charter relating to the *comitatus*, with remainder to her heirs general. Equally fatal would be a charter by Queen *Mary* granting the earldom as a new creation in 1565. Having obtained a ranking to which he was not entitled by the production of documents which the present inquiry has shewn related to the lands of the *comitatus* only, the destruction of charters which were no longer wanted for the purposes for which they were granted, but which would be fatal to the retention of that ranking, appears a probable and almost a necessary consequence; and the memorandum relating to the charter of *Robert* III. affords some evidence that such destruction may have taken place.

In summing up the evidence before us in this case given in support of the claim of the heir female, let us compare it with that which was accepted in the *Sutherland Case* as contradicting the legal presumption in favour of heirs male. The sole point of resemblance is that the Earl of *Douglas* assumed the title of Earl of *Mar* on the death of the heir male, as *Adam Gordon* did that of Earl of *Sutherland;* but it is far from certain that he continued to do so at a later period. That *Gordon's* assumption of the title was of right was proved by a continued and uninterrupted succession of heirs direct in line for 252 years, with representatives of the male line in existence to contend for the title, had the descent been properly under that limitation. In this case there was no succession to the peerage earldom. The Earl of *Douglas's* wife survived him and her son, but her second husband was Lord of *Mar* only. After her death *Isabella*, the next heir female, was for twelve years Lady of *Mar* only, and her husband Lord of *Mar* and not earl, though brother-in-law to the King. The evidence derived from the assumption of the title by her second husband, *Alexander Stewart*, a lawless man in a lawless time, under the government of his infamous uncle the Regent, cannot be held of the same value as that which took place during her first marriage. All her recorded deeds relate to the territorial *comitatus* only. *Alexander* dealt with the latter illegally after her death, and his last settlement of it contained a bribe to the Crown which probably obtained for him a grant of peerage with remainder to his natural son who was to succeed him in the *comitatus*. It has been stated as a probable reason why neither *Swynton* nor *Drummond* became Earls of *Mar* in right of their wives' peerages, that they had no issue by them. If there is any force in this objection it is equally good against the assumption of the title by *Alexander* being in right of his wife's peerage, and would add to the probability of his having been created Earl of *Mar*, as suggested, in 1426. After the *Erskines* became heirs general, one only is recorded to have ever called himself Earl of *Mar*, and none of them for 130 years attempted to claim the peerage. This fact, and the fact of the Crown during that long period having treated it as extinct by new creations, are fatal blows to the claim. The interval of more than a month after the public acknowledgment by the Crown of Lord *Erskine* as heir to *Isabella* (which gave him the ancient earldom if it was held to descend to heirs female) before he became earl at the time of the Queen's marriage, is the final and conclusive blow to it. No other earldom but that could be in *Isabella*, and the Earl did not presume to contend for it in the decreet of ranking, but set up a fancy title commencing with her. It was too well known in 1606 that the old peerage was held to be extinct in 1565 for him to attempt to get it.

The only point remaining to be considered is, what shall be held to be the remainder under Queen *Mary's* creation. The presumption is in favour of heirs male. What is there in the evidence before us to contradict that presumption? The only points urged are the charter restoring the *comitatus* to heirs general, and the fact of the person to whom the earldom was restored after the attainder being called in the Act the "grandson and lineal representative" of the attainted Earl, he being grandson only through a female. The charter being a restoration to the heirs of *Isabella* before the new peerage was created, naturally left the *comitatus* to the old limitations, and the words quoted from the Act of Parliament cannot be held to determine a matter not then inquired into, when the person obtaining the earldom was heir male as well as grandson through an heir female. There cannot be any doubt of the barony of *Erskine* going to heirs male under the presumption before mentioned, and the same presumption leads me to consider that when *John* Lord *Erskine* was created Earl of *Mar*, that earldom must be held to go with the barony to heirs male.

Under these circumstances, my Lords, I consider that the Earl of *Kellie* has made good his claim to the Earldom of *Mar* created by Queen *Mary* in 1565, and that there is not any other Earldom of *Mar* now existing. As for the title of Baron *Garioch* assumed by the opposing Petitioner, there is not any evidence before the Committee shewing that the territorial lordship of *Garioch* was ever recognised as a peerage barony.

THE LORD CHANCELLOR (1):—

My Lords, the consideration of this case has given to me, as I know it has given to those of your Lordships who have already spoken, very great anxiety, and the case has stood over from time to time in order that we might more perfectly acquaint ourselves with the mass of documentary evidence which has been placed before us. I have had the advantage of perusing the opinions which have just now been expressed to your Lordships, and I do not myself propose to do more than to add one or two sentences.

(1) Lord *Cairns*.

My Lords, I am of opinion that it is clearly made out that the title of *Mar* which now exists was created by Queen *Mary* sometime between the 28th of July and the 1st of August in the year 1565. It appears to me perfectly obvious from every part of the evidence that in the greater part of the month of July and before that creation, there was no title of *Mar* properly in existence. And, my Lords, it appears to me that the question and the only question in the case, and the question which has caused, as I have said, great anxiety to myself in the consideration of it, is whether that peerage so created by Queen *Mary* should be taken to be, according to the ordinary rule, a peerage descendible to male heirs only, or whether by reason of any surrounding circumstances that *primâ facie* presumption should be held to be excluded, and it should be taken to be a peerage descendible to heirs general. Now the *primâ facie* presumption being that which I have mentioned, it appears to me beyond doubt that the burden is thrown upon those who assert that the peerage was descendible to heirs general, to make out their case; and it appears to me that in this case in order to discharge that burden the opposing Petitioner is able to do nothing more than to make suggestions and to put forward surmises; but that there is absolutely nothing which can be taken to be evidence in any way countervailing the *primâ facie* presumption with regard to the ordinary descent of title created as this title was created.

My Lords, the burden of proof lies upon the opposing Petitioner, and it not having been in any way discharged, I am compelled to arrive at the conclusion at which my noble friends who have already addressed the Committee have arrived, namely, that this must be taken to be a dignity descendible to heirs male, and therefore that it is now vested in the Earl of *Kellie*.

The Committee for Privileges reported to the House that the Earl of *Kellie* had made out his claim to the honour and dignity of Earl of *Mar* in the peerage of *Scotland*, created in 1565; and thereupon the House resolved and adjudged accordingly; the resolution and judgment to be laid before Her Majesty by the

Lords with White Staves, and to be transmitted to the Lord Clerk Registrar of *Scotland.*

Ordered, That at the future meetings of the peers of *Scotland* assembled under any royal proclamation for the election of a peer or peers to represent the peerage of *Scotland* in Parliament, the Lord Clerk Registrar, or the Clerks of Session officiating thereat in his name, do call the title of the Earl of *Mar* according to its place in the Roll of Peers of *Scotland* called at such election, and do receive and count the vote of the Earl of *Mar* claiming to vote in right of the said earldom, and do permit him to take part in the proceedings in such election.

Agents for Lord *Kellie: Grahames & Wardlaw.*
Agent for Mr. *Goodeve Erskine: Preston Karslake.*
Agent for the Crown: *Hugh Hope.*

[PRIVY COUNCIL.]

THE GARDEN GULLY UNITED QUARTZ MINING COMPANY (REGISTERED) . . . DEFENDANTS;

AND

HUGH McLISTER . . . . PLAINTIFF.

J. C.*
1875
July 27, 28, 29
Nov. 9.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA (IN EQUITY.)

Shares—Invalid Forfeiture—Waiver—Acquiescence.

16 Ch D 185
18 Ch D 66

There must be properly appointed directors to make a call or to declare a forfeiture of shares.

A declaration of forfeiture (for non-payment of a call) of shares in a company registered in *Victoria* under 27 Vict. No. 228, was made on the 18th of June, 1869, by a resolution of the board of directors, consisting of a quorum of three, *H.*, *B.*, and *A.*, who had been elected (with two others) at a quarterly general meeting of the company held on the 14th of April, 1869; which meeting had been convened by advertisement, published on the 8th, 10th, and 13th of April, for the election of a full board of directors. It appeared that *H.* and *A.* had been previously elected directors on the 14th of January, 1867, had not retired from office as provided by the rules of the company, but had continued to act as directors up to the 14th of April, 1869:—

Held, that the said meeting of the 14th of April, 1869, having been held without due notice thereof, according to the rules of the company passed under the provisions of 27 Vict. No. 228, and of the business to be transacted thereat, the election of a full board of directors thereby was invalid, and consequently the subsequent declaration of forfeiture of the 18th of June, 1869, was also invalid. Even if *H.* and *A.* had before that election legally held office, they could not thereafter act under their former title, for the election of a full board, though invalid, necessarily involved the retirement of those, if any, who up to that time had legally held the office of director.

A declaration of forfeiture of shares invalid under the rules of a company registered under 27 Vict. No. 228, before Act No. 354 came into force, is not rendered valid by the latter Act.

Mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture.

THIS was an appeal from a decree of the Supreme Court of the colony of *Victoria* in Equity dated the 8th of October, 1874, whereby it was declared that the forfeiture by the Appellant Company of certain shares held by the Respondent in the Appellant Company ought to be set aside, and that the Appellant Company should pay to the Respondent the dividends which had accrued due upon the shares in and since the month of July, 1871, after deducting certain unpaid calls thereon.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR HENRY S. KEATING.

The Appellant Company is a company duly registered and incorporated under the provisions of the Colonial Act, 27 Vict. No. 228, its memorial of registration being dated the 18th of June, 1866. The Respondent was, from the date of its incorporation, a holder of 2181 shares.

The Appellant Company is carried on under certain rules and regulations made in the year 1866, in accordance with the Act 27 Vict. No. 228, and signed by a majority in number and value of the shareholders of the Appellant Company. The said rules and regulations, so far as they are material, are set out in the judgment of their Lordships.

The Respondent filed his bill of complaint on the 21st of October, 1873.

The facts of the case and the proceedings in the suit are sufficiently set forth in the judgment of their Lordships, from which it will appear that the question of the validity of the forfeiture, which was set aside by the above-mentioned decree, ultimately depended on the validity of the election of the persons who, assuming to be directors, declared that the Respondent's shares were forfeited for non-payment of a call purporting to have been made thereon.

Mr. *Fry*, Q.C., and Mr. *W. F. Robinson*, Q.C., for the Appellants (after a preliminary objection by the Respondents that the appeal ought to have been made, under Colonial Act 19 Vict. No. 13, s. 5, to the full Court in *Victoria* had been overruled), contended that, having regard to the rules and regulations of the company, the board of directors by which the Respondent's shares were declared to have been forfeited was duly constituted and was competent to act, and that its resolution of the 18th of June, 1869, and the consequent forfeiture, were valid. The fifth call was duly made and advertised by the directors, and ought to have been paid by

J. C.
1875
GARDEN GULLY UNITED QUARTZ MINING COMPANY
v.
MCLISTER.

the Respondent. They relied upon the fact that the Respondent was present by proxy at the extraordinary meeting of the members of the company on the 16th of August, 1867, when a resolution was unanimously passed authorizing the directors to forfeit his shares. And, accordingly, at a directors' meeting duly convened by circular and held on the 23rd of August, 1867, a resolution was passed declaring the forfeiture of the Respondent's shares for non-payment of calls, which resolution was confirmed on the 20th of September, 1867, at a directors' meeting duly convened for that day. This resolution was empowered by the resolution of the 16th of August, 1867, passed at a meeting at which the Respondent was present by proxy, and therefore no advertisement of the intention to forfeit was necessary. Again, the resolution of the 18th of June, 1867, was duly passed and advertised, and was in all respects a valid forfeiture of the shares. They relied upon Colonial Act No. 354, passed on the 29th of December, 1869, which, it was contended, removed any question as to the validity of so much of the original rules as related to forfeiture, and availed to establish the validity of any forfeiture effected under the resolution of the general meeting of the 16th of August, 1867: See sections 1, 2, and 4; and see *Schmidt* v. *Garden Gully Company* (1), and *Barfold Estate Gold Mining Company* v. *Klingender* (2). As regards the election of the directors, if any irregularity existed, the same did not invalidate the acts of the *de facto* directors in respect of the forfeiture, and such irregularity was waived by the company and the members thereof in general meeting, and also by the Respondent.

Further, assuming that the Respondent had at any time a right to relief against the forfeiture, he nevertheless, by his acquiescence in his exclusion from the company and his delay in asserting his claim to relief, had lost all right thereto. Such conduct amounted to a waiver or abandonment of his shares and of his interest therein, and precluded him from contending that they had not been forfeited, or that he continued to be the proprietor of them. Upon this point of acquiescence they referred to *Lawrence's Case* (3); *Senhouse* v. *Christian* (4); *Knight's Case* (5),

(1) 4 Australian Jurist, pp. 63, 137.

(2) 6 W. W. & A'B. 231 (Law).

(3) Law Rep. 2 Ch. Ap. 412.

(4) Reported in the note to *Hart* v. *Clarke*, 19 Beav. 356.

(5) Law Rep. 2 Ch. Ap. 321.

J. C.
1875
GARDEN GULLY UNITED QUARTZ MINING COMPANY
v.
MCLISTER.

where a resolution to forfeit was presumed: *Norway* v. *Rowe* (1); *Prendergast* v. *Turton* (2); *Clegg* v. *Edmonson* (3); where it was held that a mere assertion of a claim, unaccompanied by any act to give effect to it, could not avail to keep alive a right which would otherwise be precluded: *Hart* v. *Clarke* (4); *Lindley* on Partnership [3rd ed.], vol. ii. p. 951; *Clements* v. *Hall* (5); *Woollaston's Case* (6).

Mr. *De Gex*, Q.C., and Mr. *J. D. Wood*, for the Respondent, contended that the Appellants were not entitled now to raise for the first time the two points of acquiescence and of a valid forfeiture made on the 23rd of August, 1867, such contentions not having been raised in the Courts below. Moreover, the question of acquiescence being one of fact as well as law, could only be disposed of after evidence duly taken under an issue raised for that purpose. But upon such facts as appeared upon the record there was no sufficient evidence of the Respondent having by his conduct waived his shares, acquiesced in their forfeiture, or estopped himself from averring that he continued to be the proprietor of them. Powers of forfeiture are *strictissimi juris*, they must exist by statute or the clear terms of a contract, and those terms must be strictly followed. There is no difference between Law and Equity in cases of this kind. The distinction is between executory and executed interests; in the former case it is necessary to be prompt. The Respondent had a legal interest in his shares, it was executed, and did not require the assistance of a Court to create it. The case, therefore, must be brought within the rule in *Pickard* v. *Sears* (7) in order to bind the Respondent by any alleged acquiescence. *Clarke* v. *Hart* (4), relied upon on the other side, was not the case of a corporation, but of a partnership, and therefore there might have been a waiver in that case; but mere laches does not disentitle a Plaintiff to equitable relief. *Prendergast* v. *Turton* (8) was not even a case where the legal estate was in the person forfeiting; it was a case, also, of partnership, not of a

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(1) 19 Ves. 144.

(2) 1 Y. & C. (N.S.) 98; before L. JJ. 13 L. J. (Ch.) 268.

(3) 8 De G. M. & G. 787.

(4) 19 Beav. 349; before L. JJ. 6 De G. M. & G. 232; 6 H. L. C. 633.

(5) 24 Beav. 333; 2 De G. & J. 173.

(6) 4 De G. & J. 437.

(7) 6 A. & E. 469.

(8) 1 Y. & C. (N.S.) 98; before L. JJ. 13 L. J. (Ch.) 268.

(3) J C 3 Jur NS. 300 (5) V C 4 Jur NS. 495.

J. C.
1875
GARDEN GULLY UNITED QUARTZ MINING COMPANY.
v.
McLISTER

corporation: it was decided on the ground of abandonment, not of laches. In order to effect a valid forfeiture of shares for non-payment of a call, the call must have been regularly made by a board of directors who had been duly elected, and the shares after non-payment of the call must have been duly declared to be forfeited by a board of directors who also have been duly elected. They referred to *Naylor* v. *South Devon Railway Company* (1); *Catchpole* v. *Ambergate Railway Company* (2); *Dalton* v. *Midland Railway Company* (3); *Howbeach Coal Company* v. *Teague* (4); *Nolan* v. *Arabella Gold Mining Company* (5); *Lindley* on Partnership, vol. ii. [3rd ed.] p. 953. Shares in a company are not *choses in action: Ex parte Union Bank of Manchester, In re Jackson* (6).

Under the rules and regulations of the company the persons who made the alleged call of the 30th of April, 1867, had no power to make such a call, not being a board of directors duly elected; and, moreover, the persons who passed the resolution of the 18th of June, 1869, declaring that the Respondent's shares were forfeited had no power to pass such resolution, not being a board of directors duly elected. There has, therefore, been no valid forfeiture of the shares.

Robinson, Q.C., replied.

1875
Nov. 9.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Appellants are the Defendants, and the Respondent is the Plaintiff in a suit instituted in the Supreme Court of *Victoria*.

The Plaintiff was the holder of 2181 shares in the *Garden Gully United Quartz Mining Company*, registered under the provisions of the Colonial Act, 27 Vict. No. 228, intituled "An Act to limit the Liability of Mining Companies."

In the 11th paragraph of his bill he alleged that the Defendants pretended that his, the Plaintiff's, shares in the company were duly forfeited under and by virtue of a resolution passed by a board of directors on or about the 10th of June, 1869, for non-payment of calls; but he charged that, if any such resolution was passed, the persons passing the same were not a duly appointed board of directors of the same company; that, even if they were a duly elected board, the alleged calls, for non-payment of which such forfeiture was declared, were not lawfully made, and that he was not liable for payment of the same; that, in other respects, such declared forfeiture was invalid; and that the Defendant Company had no power to forfeit the said shares; and the Defendants were required to set forth and discover how they made out the alleged forfeiture of Plaintiff's shares, with full particulars of the dates of the meeting or meetings at which the resolutions or resolution, declaring his shares forfeited, or empowering any board of directors to forfeit the same, was or were passed; and he prayed that the forfeiture of the said shares should be declared void, that he might be restored to the rights of a shareholder, and that the Defendants might be ordered to pay to him the amount of dividends that had become due on his shares since the month of May, 1867; he, the Plaintiff, offering to pay all calls and other liabilities then due upon or in respect of the said shares.

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(1) 1 De G. & Sm. 32.
(2) 1 E. & B. 111.
(3) 13 C. B. 474.
(4) 5 H. & N. 151. 6 Jur N.S. 276
(5) 6 W. W. & A. B. 38 (Mining Ca.)
(6) Law Rep. 12 Eq. 354.

The Defendants, in their answer, stated that on the 30th of April, 1867, a fifth call of 1*s.* per share, payable on the 10th of May following, was duly made upon the shareholders by a quorum of directors duly elected. They also alleged, in paragraph 11, that in the month of April, 1869, five directors were elected at a general meeting of the company,—no directors having been elected during the previous January; and that on the 21st of May, 1869, at a meeting of directors duly held, and at which a quorum was present, the manager was directed to advertise the intended forfeiture of all shares in the company on which the said fifth call had not been paid, unless the same and all calls in arrear were paid within twelve days from the date of the advertisement; that an advertisement to that effect, signed by the manager, was inserted in the *Bendigo Advertiser* newspaper, published in *Sandhurst*, on the 28th, 29th, and 31st days of May, 1869, and the 2181 shares of the Plaintiff were specified in the said advertisement by reference to his name, and their distinctive numbers; that, on the 18th of June, 1869, at another directors' meeting,

J. C.
1875

GARDEN GULLY UNITED QUARTZ MINING COMPANY
v.
McLISTER.

duly held, and at which a quorum was present, a resolution was duly passed that all the shares on which the said fifth call had not been paid, standing in the names of the parties therein mentioned should be, and the same were thereby, absolutely forfeited to the company, and that the Plaintiff's was one of the names mentioned in the said resolution, in which his shares were specified by their distinctive numbers; and the Defendants submitted the questions of law raised by the 11th paragraph of the bill to the judgment of the Court.

Thus it appears that the only forfeiture relied upon by the Defendants was one declared on the 18th of June, 1869, in consequence of the non-payment of the fifth call within twelve days from the date of the advertisement of which the last was published on the 31st of May, 1869.

The cause was heard before the Honourable Mr. Justice *Molesworth,* who held, in accordance with the views of the full Court in the case of *Schmidt* v. *Garden Gully Company* (1), and in the judgment on appeal, in which he concurred (2), that there must be properly appointed directors to make a call and to declare a forfeiture; and that the election of five directors, a full board, at the quarterly meeting held on the 14th of April, 1869 (the meeting referred to in the 11th paragraph of the Defendants' answer), was invalid under the rules; and that the case must follow that of *Schmidt* v. *Garden Gully Company* (1), which was in effect that the forfeiture declared by a quorum of those directors on the 18th of June, 1869, was invalid; and he gave a decree for the Plaintiff, declaring, amongst other things, that the alleged forfeiture *in the pleadings mentioned* of the 2181 shares of the Plaintiff ought to be set aside, and that the Plaintiff was entitled to the said shares and to the dividends declared thereon in and since the month of July, 1871, deducting thereout the fourth, fifth, and sixth calls made by the company upon the said shares. The decree, it will be observed, was limited to the forfeiture mentioned in the pleadings, viz., the forfeiture declared at the meeting of the 18th of June, 1869, upon which alone, notwithstanding the express requirement in the 11th paragraph of the Plaintiff's bill, the Defendants relied in their answer.

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(1) 4 Australian Jurist, p. 63.

(2) 4 Australian Jurist, p. 137.

Their Lordships concur in the opinion expressed by the learned judge that there must be properly appointed directors to make a call or to declare a forfeiture of shares; that the election of five directors at the quarterly meeting held on the 14th of April, 1869, was invalid under the rules of the company and the Colonial Act 27 Vict. No. 228; and consequently, that the forfeiture declared by three of those directors on the 18th of June, 1869, was also invalid.

The Supreme Court held, in *Schmidt's Case* (1), that the fifth call was duly made. It is unnecessary to express any decisive opinion upon that point, as, whether the call was legally made or not, the decree must be affirmed, if there was no valid forfeiture for the non-payment of the call.

Their Lordships will, therefore, proceed to state their reasons for considering that there was no valid forfeiture of the shares.

By the 39th section of Act No. 228, to which reference has been made, the majority in number and value of the shareholders in any company were authorized, from time to time, both before and after incorporation, to make and alter rules for prescribing the number and qualification of directors, and fixing a quorum thereof, for holding and convening general and special, but not extraordinary, meetings of the shareholders and directors respectively; for the election, removal, and *annual retirement of all, or some of the directors;* for determining the mode of filling occasional vacancies in that body, &c.; for making calls; for the transfer and relinquishment of shares, and the conditions on which the same respectively might be effected; and for any other object not inconsistent with the Act: Provided that if any such rule should be made or altered after incorporation, it should be made or altered only at an extraordinary meeting of shareholders.

It is to be observed that no power was given by that section to make rules for the forfeiture of shares; but by an Act of the Colonial Legislature, No. 354, passed on the 29th of December, 1869, it was enacted that any company then incorporated under Act No. 228 should have, and should be deemed to have had power to make rules in the manner pointed out by the 39th section of the said Act to provide for the forfeiture of shares.

(1) 4 Australian Jurist, p. 63.

The Defendant Company was incorporated before the passing of that Act, and by rules passed before incorporation, and which were signed and sealed by the Plaintiff, provision was made for convening and holding general and extraordinary meetings of the shareholders; the number and qualification of directors; for fixing a quorum thereof; for the election, removal, and retirement (whether annual retirement or not, as required by the Act, will be presently considered) of all or some of the directors; for determining the mode of filling occasional vacancies in that body; and for the forfeiture of shares for the non-payment of calls.

Amongst others the following rules were made:—

Rule 8 was as follows:—

"The first general meeting of the company shall be held some time during the first fourteen days of the month of October, 1866, at such place in *Sandhurst* as the directors may appoint, and thereafter a general meeting of the shareholders shall be holden within the first fourteen days of the months of January, April, July, and October; such meetings shall be called general meetings, and shall have full power to regulate and control all the affairs of the company, *and every such meeting shall be convened by the manager or by the directors, by giving notice according to the Act, Vict.* 27, *No.* 228."

By Rule 9 provision was made for calling extraordinary meetings; and by sect. 23, Act No. 228, it was enacted that fourteen days' notice of every extraordinary meeting should be given to each shareholder, by inserting the same in six consecutive numbers of some newspaper published in *Melbourne*, and in six consecutive numbers of some newspaper in the neighbourhood of the place of operations of the company; that such notice should be signed by the manager, and should specify the place, the day, and the hour of meeting, and the nature of the business; otherwise that such meeting should not have power to transact any business, &c.

That section was the only one requiring notice of meetings.

Rule 9 was as follows:—

"The board of directors, or any twelve or more shareholders possessing collectively 6000 shares, may at any time, by a requisition in writing addressed to the manager, require the manager to call an extraordinary meeting of the shareholders, and every such meeting shall be summoned or convened within sixteen days of such requisition being lodged with the manager, or at the office of the company."

By Rule 10 it was declared that at all meetings each shareholder should be entitled to one vote for every share held by him in the company; that any shareholder might vote in person or by proxy; and that no law, resolution, or proceeding passed at any meeting should be impeached or invalidated on the ground that any person voting at any such meeting was not entitled to vote thereat, or upon any other ground whatsoever, unless put forward at the time.

Rule 17 provided that a board of directors, consisting of five shareholders, should be elected at each general meeting of the company, held in January and July in each year; that the directors should continue in office until the next general meeting of the company, when the three directors receiving the lowest number of votes at the first general meeting should retire, but be eligible for re-election; and that the other directors should retire at the next general meeting, but be subject to re-election. Provided that if, through any cause, the general meetings of the company were not or could not be held at the time thereinbefore appointed for the holding of such meetings, then the directors who would have retired if such meeting had been held should continue in office, and should in all respects be considered as re-elected.

The Rule also provided for any director vacating office, and for the appointment of a director in his place.

By Rule 19 it was declared that the board of directors might make calls (subject to the limitations thereinafter provided) or declare dividends; that the powers of the directors should not cease or be suspended so long as the board of directors should consist of a sufficient number of members to form a quorum.

By Rule 21 it was declared that three directors shall form a quorum, and shall have and exercise all the powers and authorities vested in the board of directors generally, as fully and effectually as if all the directors had concurred therein.

By sect. 5, Act No. 228, it was enacted that the amount of calls unpaid upon any share should be deemed a debt due from the holder of the share to the company.

J. C.
1875

GARDEN GULLY UNITED QUARTZ MINING COMPANY
v.
McLISTER.

By Nos. 29 and 30 of the company's rules it was declared that if any shareholder should neglect or refuse to pay any such call for the space of one month from the day appointed for the payment of the same, the directors should either proceed to enforce the payment thereof in manner prescribed by the Act 27 Vict. No. 228, or might proceed to declare the shares of such defaulting shareholder forfeited at any board meeting to be held after the expiration of six weeks from the day appointed for the payment of such call, and upon such declaration of forfeiture such defaulting shareholder should cease to be a shareholder in the company in respect of the shares so forfeited, and such shares and all benefit or emolument arising therefrom should vest in and become the property of the company absolutely. Provided that no such forfeiture should be declared until seven days' notice of the intention of the directors to forfeit such shares should be given to the defaulting shareholder, by advertisement, to be inserted in three consecutive issues of one of the daily newspapers published in *Sandhurst*.

On the 14th of January, 1867, a general meeting of shareholders which had been duly convened and at which the Respondent was present, was held.

At that meeting Messrs. *Ladams*, *Bruce*, *Ashley*, *Hunter*, and *Fernley* were duly elected directors, *Ashley*, *Hunter*, and *Fernley* being the three who received the lowest number of votes.

Assuming Rule 17 to be valid, notwithstanding sect. 39 of Act No. 228 expressly authorized the shareholders to make rules for the *annual retirement* of directors, and not for the quarterly retirement of some of them, *Ashley*, *Hunter*, and *Fernley* ought to have retired at the next general quarterly meeting of shareholders held on the 11th of April, 1867. At that meeting, however, no retirement in express terms took place. All that is recorded is that Messrs. *Hunter* and *McLevy* were then nominated as directors, and no other candidates being proposed, were declared *duly elected for the next six months.* Nothing is recorded as to *Ashley's* having retired and been re-elected, but it was contended in argument that as no other candidates than *Hunter* and *McLevy* were proposed, it is to be assumed that *Ashley* virtually retired and was re-elected.

BIBL. LONDIN. UNIV.

It is not very important, in the view which their Lordships take of the case, whether *Ashley* legally continued to be a director after that meeting or not.

It was held by the Full Bench of the Supreme Court that the company could not, under the provisions of sect. 39, Act No. 228, legally make a rule for the continuance of directors in office beyond the period of a year, as the Act required an annual retirement. Mr. Justice *Molesworth*, however, appears to have entertained a different opinion in the case of rules made before incorporation. He says:—

"A question arose under sect. 39, Act 228, in *Barfold Estate Gold Mining Company* v. *Klingender* (1), as to the power of a company by rules before incorporation to enable their directors to hold office until their successors were appointed, although that time might exceed a year, and the Court, having regard to the words of the section, 'rules for the election, removal, and annual retirement of some or all of the directors,' held that there was no such power. As to the *Garden Gully Company*, its rules were assented to before incorporation, and a reference to its rules was contained in the application for registration, so that, according to my opinion, a rule for the continuance of directors to hold office for more than a year, if no successors were appointed, would be valid; but I should consider myself bound by the case of *Barfold Estate* v. *Klingender*. It is unnecessary to discuss the points in which the full Court differed from me as to the construction of the rules of the *Garden Gully Company* in *Schmidt* v. *Garden Gully Company* (2). Upon the following points we were agreed, that there must be properly appointed directors to make a call, and also to declare a forfeiture, and also that the election of five directors, a full board, at a quarterly meeting, April 14, 1869, was invalid under the rules. The rules contained no provision for their electing five; and I would say that those, if any, who legally held office before that election, taking as under the election, could not be deemed to act under their former title, but the full Court said, as to the argument, that it was competent to any general meeting to elect a full board if there was no board in existence: 'We do not mean to say that the general meeting in question could not have elected a full board if proper notice had been given of the intention to do so.' Now in this case there is evidence which was not in *Schmidt's Case*, that an advertisement was inserted in the *Bendigo Advertiser*, 8th, 10th, and 13th April, that the half-yearly general meeting of shareholders would be held at the office on the 14th, for the purpose of receiving report and balance sheet, electing a full board of directors, and for general business, and it has been argued that this might be a proper notice according to the view of the full Court. I think that where all directors *de facto* are not legally appointed, there must be necessarily some way for a company to supply the defect, and that I think might be an extraordinary meeting convened under Act 228, sect. 23, that is, by fourteen days' notice, advertised in town and country newspapers, or by a quarterly meeting regularly convened, and having express notice of the object under the 8th rule of the company, which requires the giving of due notice under Act 228, that is, the same as is provided for an extraordinary meeting under it."

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(1) 6 W. W. & A'B. 23.

(2) 4 Australian Jurist, pp. 63, 137.

If the decision of the full bench in the *Barfold Estate Case* was correct, the five directors appointed in January, 1867, ceased to exist in January, 1868, in which month they ought to have retired, and a new election to have taken place. But assuming, without expressing any opinion upon the subject, that Rule 17 was valid, and that the company had power to provide for the retirement of some of the directors at the general meetings to be held in April and October respectively, and to declare that in the event of any general meetings not being held, the directors who ought to have retired at such meeting should continue in office, and in all respects be considered as re-elected; assuming, also, that by virtue of what took place at the meeting of the 11th of April, 1867, Messrs. *Ladams, Bruce, Ashley, Hunter*, and *McLevy* then constituted a legal board of directors, the question is, Did Messrs. *Hunter, Bruce*, and *Ashley*, who declared the forfeiture at the meeting held on the 18th of June, 1869, at that time constitute a valid board?

Of those three, *Hunter*, it must be borne in mind, had been elected at the meeting of the 11th of April, 1867, expressly "*for the next* six *months*," and *Ashley* had continued to act as director, as already pointed out, without having expressly retired or been re-elected at the meeting of the 11th of April, 1867.

No general meeting was held between the 11th of April, 1867, and the 14th of April, 1869. On the 8th, 10th, and 13th days of April, 1869, an advertisement was published in the *Bendigo Advertiser*, stating that the half-yearly general meeting of shareholders would be held on Wednesday, the 14th of April, 1869, *for the purpose of electing a full board of directors*, and for general business; and at that meeting a full board, consisting of Messrs. *Bruce*, *Glover*, *Hunter*, *Ashley*, and *Wormald* were elected.

The entry is as follows:—

"Company's Office, 14th April, 1869.

"General Meeting of Shareholders.

"Present:—Mr. *Bruce* in the Chair, Messrs. *Hunter*, *Ashley*, *Fernley*, *Philippi*, *Pay*, *Saunders*, and *Schumacher*.

"The minutes of meetings of 14th January, 1867, 11th April, 1867, and of special meeting of 23rd October, 1868, were read, and on the motion of Mr. *Hunter*, seconded by Mr. *Ashley*, were confirmed.

"The meeting then proceeded to the election of a full board of directors, when the following gentlemen were nominated: Messrs. *Bruce*, *Glover*, *Hunter*, *Ashley*, and *Wormald*.

"There being no other candidate, it was moved by Mr. *Connelly*, seconded by Mr. *Schumacher*, that the above-named gentlemen be appointed directors. Carried.

"The chairman then declared Messrs. *Bruce*, *Glover*, *Hunter*, *Ashley*, and *Wormald*, duly elected directors of the company.

"Moved by Mr. *Connelly*, seconded by Mr. *Schumacher*, that the matter of forfeiture of shares be left in the hands of the directors to do as they may think fit. Carried.

"That resolution was confirmed on the 14th October, 1869."

It is clear that, according to Rule 17, the election of a fresh board of directors was not the proper or ordinary business to be held at the general quarterly meetings in April or October. That was the proper business for the general meetings in January and July. The proper business for the April and October meetings was the retirement of the three directors who received the lowest number of votes at the January and July meetings respectively, and the election of others in their place. If the five persons who were directors on the 11th of April, 1867, are to be deemed to have been re-elected prior to the meeting of the 14th of April, 1869, they must, according to Rule 17, be deemed to have been re-elected at a general meeting in January, 1869, for they ought to have retired at that meeting if it had been held; and in that case, if they had been re-elected, the three who had received the lowest number of votes (and which were those three it is impossible to say) ought to have retired at the meeting of the 14th of April, 1869.

It would be a strong measure under any circumstances to hold that *Hunter*, who in April 1867 was in express terms elected for *six months only*, continued in office for two years. But the advertisement for the meeting in April, 1869, was express that the meeting would be held *for the election of a full board of directors*, and at that meeting a full board was elected.

Their Lordships cannot treat the proceedings at the meeting of the 14th of April, 1869, as having any other operation than that of an election of a full board of five directors. They concur in the opinion expressed by Mr. Justice *Molesworth*, that those, if any, of the five directors who before that election legally held office, could not, after that election, act under their former title. The election of a full board necessarily involved the retirement of those, if any, who, up to that time, legally held the office of director.

If the meeting of the 14th of April, 1869, is to be considered as an extraordinary meeting, fourteen days' notice of the meeting, and of the nature of the business to be transacted at it was necessary, and ought to have been published according to the provisions of section 23 of Act No. 228. If it is to be considered as the quarterly general meeting directed by Rule 8 to be held in the month of April, a similar notice was necessary under the provisions of that rule and of section 23, Act No. 228 above quoted, especially as the business of electing a full board of directors was not any part of the business of a meeting held in the month of April.

In any view, the meeting of the 14th of April, 1869, was held without due notice of the meeting and of the business to be transacted thereat; and their Lordships are of opinion that the election of a full board of directors at that meeting, upon which the Defendants relied in their answer, was invalid, and that the persons so elected had no power to declare a forfeiture. The forfeiture of the 18th of June, 1869, was consequently invalid, whether Rule 17 was a valid rule or not; for if it was invalid, *Hunter*, *Bruce*, and *Ashley* ceased to be directors after one year from the date of their appointments. Such forfeiture was, therefore, properly declared void by the decree of the 8th of October, 1874, from which this appeal is preferred.

It was contended at the Bar, on behalf of the Appellants, that the Colonial Act, No. 354, passed on the 29th of December, 1869, rendered all forfeitures valid. The object of that Act was to authorize any company, registered under Act No. 228 to make rules in the manner pointed out by the 39th section, for the forfeiture of shares, and to declare that any such company should be deemed to have had such power. Section 2 rendered valid all forfeitures of shares made in conformity with such rules which would have been valid if the company at the time of declaring such forfeitures had had the power under any rules of declaring forfeitures; and section 4 expressly enacted that nothing theretofore contained should be deemed to confer upon any person any right or remedy which he would not have possessed, if the power to make rules for the forfeiture of shares had been contained in the said first-mentioned Act.

It is perfectly clear that a declaration of forfeiture invalid under the rules of the company was not rendered valid by that Act.

It was further contended that, by virtue of Rule 10, the resolution passed at the meeting of directors of the 18th of June, 1869, by which the shares were declared forfeited, could not be impeached upon any ground; but that rule applied to meetings of shareholders, and not to meetings of the directors, or to resolutions passed at a meeting of directors; and it is evident that such rule could not have been and was not intended to extend to resolutions passed at invalid meetings, or to resolutions which were *ultra vires.* If it could by possibility apply to such meetings, it would itself be *ultra vires* as enabling the directors to violate the provisions of Act. No. 228.

The case was argued very elaborately and with great ability on both sides. Two points were raised on behalf of the Appellants which do not appear to have been even suggested in the Court below. They were certainly not set up by the answer, or even adverted to by the Court in the judgment or in the decree.

They are, 1st, That the Plaintiff's shares were forfeited by a resolution of a board of directors on the 23rd of August, 1867.

2ndly. That the conduct of the Plaintiff amounted to a waiver or abandonment of his shares, and precluded him from contending that they had not been forfeited, or that he continued to be the proprietor of them.

It appears that on the 26th of July, 1867, an extraordinary meeting of shareholders was advertised for the purpose, amongst other things, of considering what action was best to be taken with defaulting shareholders; that on the 16th of August in that year an extraordinary meeting was held, at which the Plaintiff was present by proxy, and that it was there proposed and carried unanimously that the directors should be, and were thereby empowered to forfeit any shares on which calls were owing within fourteen days from that date, if they should deem the same advisable; and that at a meeting of directors held on the 23rd of August, 1867, it was proposed and carried that, in accordance with the resolution passed at the meeting of the 16th of August, the shares of the Plaintiff and of certain other specified shareholders should be and were thereby declared forfeited for non-payment of calls, and that their interest in the company should cease. It was contended on behalf of the Plaintiff that, as by Rule 30, it was provided that no forfeiture should be declared until seven days' notice should have been given to the defaulting shareholder by advertisement to be published, as therein mentioned, of the intention of the directors to forfeit such shares, an advertisement of the intention to forfeit the shares ought to have been issued before the forfeiture was declared: on the other hand, the Defendants contended that no such advertisement was necessary, at least so far as the Plaintiff's shares were concerned, inasmuch as he was present by proxy at the meeting at which power was given to the directors. It is clear, however, that the meeting neither gave nor intended to give power to the directors to forfeit shares in a manner contrary to the express provisions of the rules, and that the meeting had no power to do so. It was not the intention of the Plaintiff, voting by proxy, or of the other shareholders present,

J. C.
1875

Garden Gully United Quartz Mining Company v. McLister.

that the Plaintiff's shares, or those of any other shareholders present, should be forfeited in a manner different from that which would be binding upon other shareholders who were not present; and their Lordships are of opinion that, notwithstanding the resolution passed at the meeting of the 16th of August, every shareholder, including those present at that meeting, was entitled under Rule 30 to seven days' notice to enable him to pay his calls before a forfeiture of his shares could be declared; and that the forfeiture declared on the 23rd of August, 1867, was invalid.

As to the second point, it appears that at a meeting, held on the 21st of May, 1869, at which Messrs. *Hunter*, *Bruce*, *Ashley*, and *Wormald* were present and acted as directors, and upon whose, or some of whose, proceedings the Appellants relied, both in their answer and at the hearing in the Court below, it was stated by the manager that the forfeiture of the shares already made, alluding to the forfeiture of the 23rd of August, 1867, was not legal, inasmuch as the clause in the company's deed requiring the shares to be advertised had not been complied with, whereupon it was moved and carried that the manager should be instructed to advertise the forfeiture of all shares on which the shilling call (that is the fifth call) had not been paid, unless the same and all back calls should be paid within twelve days from the date of the advertisement; that an advertisement was accordingly published on the 28th, 29th, and 30th of May, 1869, stating that, amongst others, the Plaintiff's shares would be forfeited, unless the calls were paid within twelve days from that date.

It is clear that as late as the 30th of May, 1869, it was considered by the manager and by a board of persons acting as directors, upon whose acts the company rested their case, that the Plaintiff's shares had not been legally forfeited, and that twelve days were given him to pay his calls. Up to that time, therefore, he cannot be treated by the Appellants as having abandoned his shares, or as having done anything to preclude himself from contending that they had not been forfeited, and that he was not the legal proprietor of them.

There is no evidence sufficient to induce their Lordships to hold that the conduct of the Plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly is no evidence to justify such a conclusion with regard to his conduct subsequent to the advertisement of the 30th of May, 1869. In this case, as in that of *Prendergast* v. *Turton* (1), the Plaintiff's interest was executed. In other words, he had a legal interest in his shares, and did not require a declaration of trust or the assistance of a Court of Equity to create in him an interest in them. Mere laches would not, therefore, disentitle him to equitable relief: *Clark and Chapman* v. *Hart* (2). It was upon the ground of abandonment, and not upon that of mere laches, that *Prendergast* v. *Turton* (1) was decided. In March, 1870, the Plaintiff claimed his shares, and tendered the amount of his calls. The delay after that date in filing his bill was not evidence from which a waiver or abandonment of his right can be fairly inferred.

There was some evidence as to statements having been made by the Respondent to the effect that he would allow his shares to be forfeited, as he could buy them for less than his calls; that the company might forfeit them, and that he did not see why they did not, and the like. The Respondent denied that he ever made the statements imputed to him. The Court below expressed no opinion upon that part of the case; nor was it necessary, as the point of abandonment, or estoppel, was not set up by the answer; nor, so far as it appears, at the hearing in that Court. Besides, the conversations in which the Plaintiff is alleged to have made those statements were long prior to the 30th of May, 1869, when the advertisement appeared giving the Plaintiff twelve days to pay his calls.

Their Lordships are not disposed to hold parties too strictly to their pleadings in the Lower Courts; but they consider that it would be an act of great injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the Courts below. They do not, therefore, wish it to understood that by hearing the learned Counsel for the Appellant, and by expressing an opinion upon points which were not raised in the Court below, they would have felt themselves justified in reversing the decision of the Court below, if they had considered that the points thus raised constituted a defence to the Plaintiff's claim.

(1) 1 Y. & C. Ch. 98.

(2) 6 H. L. C. 633.

J. C.
1875
GARDEN GULLY UNITED QUARTZ MINING COMPANY v. MCLISTER.

Upon the whole, their Lordships are of opinion that the judgment and decree of the Supreme Court were correct; and they will, therefore, humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Valpy & Chaplin.*
Solicitors for the Respondent: *Gamlen & Son.*

[PRIVY COUNCIL.]

J. C.*
1875
Dec. 7, 8.

WALTER TURNBULL AND OTHERS . . . PLAINTIFFS;
AND
THE OWNERS OF THE SHIP "STRATHNAVER," HER CARGO AND FREIGHT . . . . DEFENDANTS.

THE "STRATHNAVER."

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW ZEALAND.

Salvage—Towage Services—Arrest of Ship—Demurrage.

5 PD 122

In a salvage suit promoted in respect of certain services whereby the Defendant's vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:—

Held, that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit.

The Charlotte (1) approved.

No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of *mala fides* or malicious negligence.

The Evangelismos (2) approved.

THIS was an appeal from two decrees of the 3rd of December, 1874, and the 11th of December, 1874, respectively, of the Judge

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* *Present*:—SIR R. J. PHILLIMORE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) 3 W. Rob. 68.

(2) 12 Moo. P. C. 352: Swabey, 378.

J. C.
1875
THE
"STRATHNAVER."

of the Vice-Admiralty Court of *New Zealand,* in a cause of salvage promoted in that Court by the Appellants as the owner, master, and crew of the steamship *Storm Bird* against the ship *Strathnaver,* her cargo and freight, for the recovery of salvage in respect of certain services whereby the ship had been safely towed to the Port of *Wellington.* By the former decree the Judge pronounced that under the circumstances appearing in the suit, and which are sufficiently set forth in the judgment of their Lordships, no salvage service had been performed by the Appellants; and the Respondents not having tendered payment as for towage services the Judge refused to decree such payment in this suit to the Appellants, whom he condemned in costs, dismissing the ship, cargo, and freight, and the owners thereof respectively, from all further observance of justice in the cause. By the latter decree the said Judge pronounced that the Respondents (the owners of the ship) were entitled to recover £600 for the demurrage and detention of the ship under the warrant of arrest issued by the Appellants in the cause, which warrant had been executed on the 12th of September, 1874.

Dr. *Deane,* Q.C., and Mr. *Webster,* for the Appellants, contended that the evidence shewed the *Strathnaver* and her cargo to have been in a position of considerable danger, from which they were rescued by the services of the Appellants; that such services involved a deviation from her voyage by the *Storm Bird,* delay, and serious risk, and must be regarded as in the nature of salvage services. Further, that, notwithstanding that no tender had been made by the Respondents on account of towage services, yet the Appellants were, nevertheless, entitled to a decree at any rate for towage, if the evidence did not establish a right to salvage remuneration. They also contended that the Court below had no jurisdiction to decree demurrage to be due from the Appellants; and that no such damages were sustained or recoverable.

Mr. *Cohen,* Q.C., and Mr. *E. C. Clarkson,* for the Respondents, contended that the evidence shewed that in whatever peril the *Strathnaver* had at one time been placed or about to be placed, she had been rescued therefrom by the orders of her own pilot, and before the *Storm Bird* came up; that the services solicited were towage services, and the Appellants were not in law or in fact engaged as salvors; and the Court had no power to decree payment of towage services in a salvage suit, no tender of such payment having been made. They supported the decree as to demurrage.

The cases cited were *The Evangelismos* (1); *Mitchell* v. *Jenkins* (2); *Davies* v. *Jenkins* (3). [SIR ROBERT PHILLIMORE referred to *The Harbinger* (4), where a tender of the usual amount for towage services was affirmed in a cause for salvage, the Court holding that the services rendered did not amount to salvage services.]

The judgment of their Lordships was delivered by

SIR ROBERT PHILLIMORE:—

This is an appeal from a decree of the Deputy Judge of the Vice-Admiralty Court of *New Zealand*, in a case of salvage promoted by the Appellants, the owner, master, and crew of the steam-ship *Storm Bird*, against the ship *Strathnaver*, her cargo and freight, for recovery of salvage in respect of certain services rendered to the ship, her cargo, and freight.

It is hardly necessary that their Lordships should repeat what they have often had occasion to say with regard to cases of this description, namely, that where facts have been established by oral testimony before the Court below, and the Court has maturely deliberated, and formed its opinion as to the credence due to the witnesses on the one side and the other, this Court rarely interferes with such a finding on the part of the Judge, and never unless there has been a manifest miscarriage of justice.

It appears that at about a quarter past eight P.M., on Monday, the 31st of August, last year, the steam-ship *Storm Bird*, of 68 tons register, manned by a crew of twelve hands, was coming out of the harbour of *Port Nicholson*, *New Zealand*, on a voyage from *Wellington* to a place called *Wanganui*, with a cargo and seventy passengers. The *Strathnaver* was a wooden ship of 1017 tons, a sailing vessel with a cargo and 391 emigrants. She was entering the harbour at the time the other vessel was going out. The captain of the *Storm Bird* says: "When abreast of the *Steeple*

(1) 12 Moo. P. C. 352; Swabey, 378.

(2) 5 B. & Ad. 594.

(3) 11 M. & W. 755.

(4) 16 Jur. 729.

Rock"—the exact position has been much considered in the course of this debate, and is some way up the entrance of the harbour,—"my attention was drawn by the chief officer to signals, blue lights and rockets, bearing from us S.S.W., coming as from the direction of *Chaffer's Passage*, and to the S. and W. of *Barrett's Reef*. I took my glasses and went on the bridge and saw the loom of a large vessel; I likewise saw a green light. Nearing the heads opposite *Barrett's Reef*, I made it out to be a ship. I was then about 100 yards N. of the *Outer Rock*. We were on a straight course. The green light of the ship was almost south, about two and a half points before our starboard beam to the S.W. of the *Outer Rock*. I considered the vessel was running into danger by going into *Chaffer's Passage*. I burned a blue light; my object was to indicate the position of the safe channel. At the same time I steamed with all haste towards the ship, about eight miles an hour. It was just as we were abreast the *Outer Rock*, about 150 feet off, that I put on steam and altered course to S. and W. I could not see the green light except when she rolled. I steamed towards her bows." Then he says: "She was inside a line drawn from *Pencarron Head* to end of the *West Ledge Reef*, heading towards the old pilot station, about two cables length from the part of the *West Ledge* nearest to the *Outer Rock* of *Barrett's Reef*. He goes on to say, what is admitted, that the wind was very light from the south-east. He then says, when he came up to the bows of the vessel he thought it unsafe to go round her bows; that he steamed under her stern and came up again a second time, and then, when he got astern of the ship, he stopped his engine and called out "port your helm;" that he was barely fifty yards from her stern, and he repeated the words three or four times, "port your helm; steer for the light; you are running on a reef." There is no doubt that when the *Storm Bird* came up the pilot was on board.

Now it will be proper to refer to the evidence of the pilot of the *Strathnaver*, and to shew what his account of the position of the vessel at this time is. The pilot first gives an account of where he was. He says: "When I first got alongside, she was from half to three-quarters of a mile from the *Outer Rock* of *Barrett's Reef*, nearly due south. The red light of *Somes Island* was open all the time." A little lower down he says: "I said from the boat 'port your helm,' after that I had been a minute or two alongside. I did not see any reason at that time for being extremely expeditious. The proper course was to get the vessel into the white light. The steamer gained on us, but not much. We pulled our boat four and a half to five knots. We arrived at the ship before the steamer." That is an undoubted fact in the case. "After I got on deck, I braced the yards up, and set the upper mizen topsail, and loosed the main top-gallant sail. It was sheeted home, but am not positive whether it was hoisted up. When the steamer came the first time she came from the direction of the lighthouse at right angles to us, and as she passed I heard Captain *Doile* singing out 'port.' I recognised his voice. I said, 'all right.'"

Now their Lordships are of opinion upon an examination of the evidence with regard to the situation of the *Strathnaver*, that at this time it is clear that she was not heading up channel as she ought to have been, but, owing to the ignorance of the captain as to the chart, she was crossing the mouths of both the channels, so to speak, and she was to the south of the *Outer Rock* about three-quarters of a mile to the southward. There is no dispute as to the fact that the pilot gave these orders, or that he was on board the vessel before the steamer came up.

It appears to their Lordships that the evidence upon which the learned Judge of the Court below relied was perfectly credible, that these orders were those which enabled the ship to be rescued from a situation of danger,—or perhaps, to speak more accurately, of running into great danger,—because had she continued her course with the wind as it then was, blowing lightly from the south-east, there is no doubt that she would have run upon the *West Ledge;* and the first question which is really to be determined in this case, when we are considering whether salvage remuneration is due or whether the service was simply one of towage, is, whose advice or whose order it was that prevented this large ship from running upon the *West Ledge Rock?* There is no reason to doubt that the captain of the *Storm Bird* did what he says he did, namely, that he shouted out "port," and that he burned a light by way of a signal. At the same time there is equally no doubt that the pilot when he came up,—the exact time is difficult to ascertain, the learned Judge thinks it was a short time, but it was an appreciable time before the arrival of the *Storm Bird*,—he gave the order from his boat, being anxious, no doubt, that no time should be lost in order to port the helm, and to brace the yards on the starboard tack. It was the execution of that order which, in the opinion of the Court below—and their Lordships on the whole, see no reason to differ from it, and it is also the opinion of the nautical assessor, by whom their Lordships are assisted to day,—it was the execution of that order which rescued the ship from running into the danger which she otherwise would have incurred. Their Lordships therefore cannot ascribe the character of a salvor to the steamer, on the ground that she also gave the advice which has been mentioned.

Now there is no doubt of this fact, that when the steamer did come up again, having crossed the stern of the other ship, and come up again on her port bows, she was engaged to take the vessel in tow, and the question then arises, which has been so much contested in the Court below and before their Lordships to-day, whether she may be considered, in construction of law, to have been engaged as salvor, or to have been engaged merely to tow.

Upon this point it may be well to refer to a very clear and precise statement of the law by Dr. *Lushington*, in the case of *The Princess Alice* (1), in which he says, "without attempting any definition which may be universally applied, towage services may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than the accelerating her progress." It is contended on behalf of the Appellants that something more was required than the acceleration of her progress, and that she was still in danger after the pilot had given the order to port the helm, and to brace the yards on the starboard tack, and to put the head of the vessel exactly in the opposite direction from what it had been, and to direct the course of the vessel eastward instead of north-westward upon the rock.

Now this is a question upon which the learned Judge had

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(1) 3 W. Rob. 138.

J. C.
1875

THE "STRATHNAVER."

a variety of conflicting testimony before him, and after most maturely and carefully deliberating upon it—and, it may be observed, in passing, it would be difficult to conceive a more accurate and careful note than the learned Judge seems to have been at the pains of taking—after mature deliberation on the subject, he came to the conclusion that the *Storm Bird* was not engaged as a salvor, but merely to tow the vessel. The facts stand in this way; they are thus described in the evidence of the pilot. He says: "After the steamer passed she stopped. I thought she was going on her course. I had no thought of taking a steamer then. I then had a conversation with the captain"—that is, his own captain—"on the propriety of getting a steamer to tow us, not on account of danger, but on account of expedition." It may be observed, in passing, that this large vessel had a number of emigrants on board, who were naturally extremely anxious to arrive at the port. "I think the master of the steamer might have been deceived as to the position of our ship, because he came out on the bright light and saw the vessel under the red." In the lighthouse at *Somes Island* there are three lights, a green light, a white light, and a red light. The white light is the one which should be followed; it is the safe light leading to the central passage up the main entrance, and which ought to be followed. He goes on to say: "It might have appeared to him she was more to the west than she was. I know the position exactly from pulling from the *Outer Rock* to the ship. The captain hesitated about taking the steamer. I told the captain she belonged to a respectable firm. He asked the name, and I told him. He said they corresponded with his owners or consignees. Something to that effect. I then hailed the steamboat." Now it is important to observe what he says passed. "I said '*Storm Bird*, ahoy!' He said, 'What is it?' I said, 'Will you give us a tow?' He said, 'Yes.' I said, 'What will you give us a tow for?' He said, 'Leave that to the agent,' or to that effect. That did not satisfy the captain till I told him about Mr. *Turnbull*. I then said, 'All right, I will give you a tow line.' I said, 'If you will only tow me inside the *Steeple Rock* that will do.' I do not know whether he heard or not."

J. C.
1875
THE "STRATHNAVER."

Now the evidence establishes both these facts, first, that the pilot proposed to engage him merely to tow the vessel; and, secondly, that the captain of the *Storm Bird* never accepted the proposal as a mere service of towage. Therefore the question must be determined with reference to the necessity of the ship at this time, because the captain not having accepted the offer to tow, if the vessel was in a state of danger at that time, and he had towed her, he would be entitled to be considered as salvor; but it has been already stated that the Court below was satisfied that at this time there was no danger to the vessel. Their Lordships think they ought not to disturb this decision, but, inasmuch as the learned Judge has used the words "actual danger" very often, although probably it received a restriction in his own mind which was not stated, it may be useful to state what is really the law with respect to services rendered to a vessel in danger or apparent danger, the law is laid down in the case of *The Charlotte* (1) by Dr. *Lushington.* He says, "It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute." Their Lordships are of opinion there was neither actual nor imminent probable danger at the time these services were rendered. The finding of the Judge to this effect, no doubt, depended upon his giving preference to the witnesses who were produced on behalf of the Respondents over those who were produced on behalf of the Appellants. If indeed the Judge had been satisfied that what the Appellants' witnesses asserted was true, namely, that the pilot said to them, "Will you tow her off this reef?" the case would have assumed a very different aspect, and it might have been fairly urged in that case that what the *Storm Bird* did was an act of salvage and not an act of towage. But in the circumstances which have been stated, the learned Judge came to a different conclusion upon the facts before him, and their Lordships, on the whole, decline to set aside that decision. Therefore, upon that part of the case, their Lordships will humbly recommend Her Majesty to affirm the judgment.

There is another portion of the judgment, by no means imma-

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(1) 3 W. Rob. 71.

J.C.
1875
THE
"STRATHNAVER."

terial, to which I must now advert. It appears that the learned Judge of the Court below was of opinion that he could entertain in this case a claim for demurrage. The property was valuable, and worth in all about £40,000. The action I think had been entered for £12,000. The learned Judge upon the whole thought he was justified in decreeing to the Respondents damage to the amount of £600 in the shape of demurrage. Now it is to be observed that the learned Judge himself more than once in the course of his judgment expressed his opinion that those on board the *Storm Bird*, and especially the captain of the *Storm Bird*, conducted themselves *bonâ fide* throughout, and he ascribes no misconduct to him of any sort or kind, but simply an error in judgment in bringing the suit. Now their Lordships think that the learned Judge was well founded in that opinion. In this state of things their Lordships are at a loss to understand why any damages at all should have been granted against the Appellants. The law upon this was very carefully considered in the decision in the case of *The Evangelismos* (1), by the very eminent Judge who delivered their Lordships' opinion, Mr. *Pemberton Leigh*. In that case "the collision took place at sea. The vessel causing the damage got away. From the appearance of a vessel in port the owners of the damaged vessel caused her to be arrested to answer an action for damages. The vessel seized was a foreign vessel, and in consequence of the owner having no funds in this country, she was detained for some months before she was released on bail. The Plaintiffs failed to identify the vessel seized as being the one causing the damage, and the Admiralty Court dismissed the action with costs, refusing to award damages." Then there was an appeal to their Lordships, and Mr. *Pemberton Leigh* in delivering the judgment of their Lordships said: "It is also said that it is the established rule of the Admiralty Court where a party brings an action and succeeds in upholding it, that he is entitled, unless there are circumstances to take it out of the ordinary rule, to have compensation for the loss he has suffered, which in some cases is very inadequate, but it is the only compensation the Court can award. Their Lordships think there is no reason for distinguishing

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(1) 12 Moore, P. C. 352.

J. C.
1875
THE "STRATHNAVER."

this case or giving damages. Undoubtedly there may be cases in which there is either *mala fides* or that *crassa negligentia* which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at common law damages may be obtained. In the Court of Admiralty the proceedings are however more convenient, because in the action in which the main question is disposed of, damages may be awarded." Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been seized, that in the absence of proof of *mala fides* or malicious negligence, they ought not to give damages against the parties arresting the ship. It appears to their Lordships that the general principles of law are correctly laid down in that judgment, and it is their intention to adhere to them. They will therefore humbly advise Her Majesty that that part of the learned Judge's sentence be reversed.

Their Lordships think that inasmuch as the Appellants have succeeded in part of their case, and as they have appealed from the whole judgment, they will follow the rule which they have usually adopted on these occasions, and leave both parties to pay their own costs of the appeal. But their Lordships think the Appellants are entitled to have their costs in the Court below strictly confined to the costs incident to the decree as to demurrage, and that they must pay the costs of the salvage suit in the Court below.

Solicitors for the Appellants: *J. & R. Gole.*
Solicitors for the Respondents: *Hollams, Son, & Coward.*

[PRIVY COUNCIL.]

J. C.*
1875
Jan. 27.

IN THE MATTER OF THE ENDOWED SCHOOLS ACT, 1869;

AND

IN THE MATTER OF A SCHEME FOR THE MANAGEMENT OF ALLEYN'S COLLEGE OF GOD'S GIFT, AT DULWICH, AND FOR THE MANAGEMENT OF THE PICTURE GALLERY ENDOWMENT OF THE FOUNDATION OF SIR PETER FRANCIS BOURGEOIS AND MARGARET DESENFANS.

Endowed Schools Act, 1869, *ss.* 13, 39—*Vested Interest of Petitioner—Compensation.*

The Appellant, as Master of *Alleyn's College of God's Gift*, at *Dulwich*, held an office created and defined, both as to its value and duties, by 20 & 21 Vict. c. 84. The Act provided for his dismissal from office by a certain majority at a meeting constituted and convened in a particular manner, of the governors of the college; no such meeting ever having at the date of appeal been convened, and no such majority having at that date ever had existence. In a petition presented under sect. 39 of the *Endowed Schools Act*, 1869:—

Held, that the Appellant had a vested interest in his office and the emoluments thereof within the meaning of the 13th section of the *Endowed Schools Act*, 1869, which interest must, under the said section, in any scheme by the Charity Commissioners relating to the college, be saved or duly compensated for. As it appeared that such interest had neither been saved nor duly compensated for, it was ordered that the scheme should be remitted to the Commissioners, with costs to be paid out of the funds of the endowment.

THIS was an appeal by the Rev. *Alfred James Carver*, master of the above-named college, against a scheme framed by the Endowed Schools Commissioners for the management of the college and endowments, which was approved by the Committee of Council on Education on the 7th of May, 1875. Down to the date of the appeal the charity had been regulated by the scheme set out in the schedule to 20 & 21 Vict. c. 84; by sect. 3 of which the management of the charity and estates was vested in governors. That scheme also provided that three-fourths of the funds of the college should

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* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.
1875
In re
Alleyn's
College,
Dulwich.

be devoted to educational, and one-fourth to eleemosynary purposes (see sect. 42); that an upper school and lower school should be founded and maintained out of the funds of the college in the hamlet of *Dulwich* (see sect. 45); and that there should be a head master and an under master of the upper school, the former to be styled the "Master of *Alleyn's College of God's Gift*, at *Dulwich*," and to be remunerated as next hereinafter stated.

Sects. 49 and 60 of the scheme fixed the remuneration of the master of the college. The former provided that he was to receive a fixed annual salary of £400 out of the income of the educational branch of the charity, and also, in addition to such fixed salary, a half-yearly payment of £1 10*s.* for every boy exceeding the number of fifty who should have *bonâ fide* attended the school for a period of not less than three calendar months during the then preceding half year. The latter section provided that one moiety of the annual capitation fees should be paid half-yearly to the master of the college, in augmentation of his stipend.

Sect. 88 of the scheme contained a form of declaration to be signed by the master of the college and other masters previously to entering office under the provisions of the scheme, containing the following passage:—"And that in case I shall be removed from my office by the governors according to the provisions of the same scheme, I will acquiesce in such removal, and will thereupon relinquish all claim to such office and its future emoluments, and upon any such removal or upon any avoidance of my office, possession of my official residence with its appurtenances may be forthwith taken by the governors or any person appointed by them to take possession of the same."

Sects. 89 and 90 of the same scheme related to the removal of masters, and were in the following terms:—

"89. The master of the college, and the under master of the upper school, and the master of the lower school respectively, shall be liable to be removed from their respective offices by the resolution of the governors present at a special meeting to be called for the express purpose of considering the expediency of such removal upon a requisition of at least three governors, provided that the resolution for such removal shall be carried at such meeting by at least two-thirds of the governors present, and that the number of the governors voting for the removal shall not be less than seven, and provided that the notice of meeting shall in this special case have been given to every governor by the space of at least one calendar month previously to the holding thereof, and that notice thereof shall have been also given in like manner by the same space previously to the master whose removal shall be proposed, and that such resolution shall be entered on the minutes and signed by the governors voting for the same.

"90. The master of the college, and the under master of the upper school, and the master of the lower school, shall also respectively be removable by the governors under the provisions of the *Charitable Trusts Act*, 1853, and the governors may assign to any master or under master upon his removal under this or the last foregoing clause, or upon his retirement, such a reasonable annual allowance by way of retiring pension, to be paid out of the income of the educational branch of the charity, as the Board of Charity Commissioners for *England* and *Wales* shall sanction."

The Appellant was appointed to the office of master of the college in April, 1858, and had continued in his office down to the time of appeal. At the former date the only boys under instruction at the college were the twelve poor scholars of the old foundation. Early in 1860 the governors determined on building a new college, which was ultimately completed in 1870, but a heavy outlay was required for that purpose. Accordingly in 1868, the Appellant with a view, as he alleged, to aid the school in its early days, consented for a period of five years only, or for such shorter time as should be eventually agreed on between the governors and the Appellant, to compute the proportion of tuition fees due to him under sects. 49 and 60, upon the assumption of a total average fee of £7 per boy, and to surrender for such time all further interest in such fees; and to relinquish all additional emoluments whatever due to him under sects. 49 and 60 for all boys above the number of 250, in consideration of a fixed annual payment of £2 per boy.

(At this time the fees were raised to £12, £15, and £18 per boy, and the number of boys to be admitted to the school, fixed in the first instance at 360, was after the completion of the new building further extended to 600.)

The effect of the above temporary arrangement on the capitation fees and allowances under sects. 49 and 60, was to make the following fees receivable by the Appellant:—

For all boys up to the number of 250, a fee of £3 10*s.* per boy, under sect. 60.

For all up to 250, except the first fifty, a fee of £1 10*s.* per half year (*i.e.*, £3 per annum) per boy, under sect. 49. For all exceeding 250, a total fee of £2 per boy.

In 1873, the foregoing arrangement was continued by mutual consent for another year, and after that for a further additional year, making the 31st of December, 1875, the date of the absolute determination of the temporary arrangement, after which the rights of the Appellant as they originally stood under the Act of 1857 revived.

The upper school at the time of appeal numbered over 550 boys who paid the capitation fees on the amended scale of 1868, and but for the arrangement above referred to, the Appellant would, under the provisions of the Act of 1857, have been in receipt of the proportion of the capitation fees and payments of the scholars, provided by sects. 49 and 60. The Appellant's income calculated according to the provisions of sects. 49 and 60, would (as he alleged) amount to about £6000, and would increase with the number of scholars. The new buildings had been completed, and were sufficient to admit of a further considerable increase in the number of scholars, and the number of scholars had been increasing from time to time.

In 1872, a draft scheme was prepared by the Endowed Schools Commissioners for the management of the trust, and memorials against the same were in 1873 presented by, amongst others, a committee of residents on the estate and the Appellant.

In 1874, the scheme now appealed against was prepared and issued by the Endowed Schools Commissioners, and the Appellant presented two memorials to the Committee of the Council on Education, setting out objections thereto. In addition to these memorials a remonstrance against the said scheme was sent to the Committee of Council on Education by the *Dulwich* Education Committee, and petitions objecting to the scheme were signed and presented by a large number of inhabitants of *Dulwich*.

On the 7th of May, 1875, the scheme was approved by the Committee of Council on Education.

The nature and effect of the scheme (which was very lengthy, consisting of 149 sections and a schedule), so far as is material, may be sufficiently gathered from the arguments of counsel hereinafter set forth and the judgment of their Lordships.

The Appellant, as a person directly affected by the scheme and aggrieved thereby, petitioned Her Majesty in Council to withhold her consent to the same.

Sir *W. V. Harcourt*, Q.C., and Mr. *J. D. Bell* (Mr. *C. Bowen* with them), for the Appellant:—

The title of the Appellant rests on 20 & 21 Vict. c. 84, by which the above-named charity was reconstituted and thereafter called *Alleyn's College of God's Gift*, at *Dulwich*. Sects. 47 and 49 of the schedule annexed to the Act provided for the appointment of head master with the general control and superintendence of the educational branch of the charity, subject to the superior authority of the governors, to whom he should be responsible for the conduct thereof. The effect of the new scheme was materially to affect the character and tenure of the office so established and vested in him. It dealt with the endowment as an appropriated fund placed at the disposal of the Commissioners, and treated the great school at *Dulwich* merely as one of a number of schools to be established under their authority, and assigned to it only a small and inadequate interest in the trust estate. Under the scheme the college would be degraded from its position as an endowed school of the highest class, while the Appellant's office would be virtually abolished while nominally retained. His authority would be restricted to *Dulwich College*, and that college is by the scheme carefully distinguished from *Alleyn's College of God's Gift*—a term which in the scheme is used in a new sense, to signify not the domus of *Alleyn's* foundation, but the general trust fund. The Appellant would simply be master of *Dulwich College*, a boys' school conducted in the new college buildings; but he would no longer be master of *Alleyn's College*, at *Dulwich*, with the general control and superintendence of the college, and especially of the educational branch, as given by 20 & 21 Vict. c. 84. In his new capacity he would be subject, in common with the masters of other schools created by the scheme, to the general regulations described in Part VI. of the scheme; the effect of which, it is contended, would be to impose most unusual and rigorous restrictions upon the free development of the school.

The vested interests of the Appellant would be injuriously affected in that his office under the scheme would be inferior in value, consideration, and importance to his office under the Act. The income of the Appellant under the scheme is to be the amount which he received in 1872, *i.e.*, £2307, which was one of the years included in the temporary arrangement of 1868. The income to which he is, now that the temporary arrangement has ceased, entitled under the Act of 1857, amounts to about £6000 a year, with a prospect of increase. In making the receipts of 1872 the standard of future remuneration, the scheme ignored the voluntary, temporary, and special nature of the arrangement made. Other objections are, that masters can be appointed under the scheme by the governors, who shall be independent of the Appellant; a power of dismissal is given to the governors which did not exist under the Act; it is extremely doubtful whether any and what provision is made for the payment of the Appellant's remuneration and pension. Under these circumstances the scheme is not one made in conformity with the *Endowed Schools Act*, 1869, for it does not save, or make due compensation for, the Appellant's vested interest as an officer appointed before the *Endowed Schools Act*, 1868, or his interest in the pension and compensation allowance to which he would be entitled at the passing of the *Endowed Schools Act*, 1868. Further, it is objected that the Appellant has been oppressed by menace and peril of multiplied costs at the hands of bodies with public moneys to dispose of, and it is submitted that in any event the costs of several appearances should not be allowed against him.

Mr. *Fry*, Q.C. (Mr. *Romer* with him), for the Respondents, the Charity Commissioners for *England* and *Wales*:—

[LORD SELBORNE:—Their Lordships will hear one counsel for the Commissioners and one counsel for the governors.]

There are two questions in this case: (*a*) Has the Appellant an

J. C.
1875
In re
ALLEYN'S
COLLEGE,
DULWICH.

interest of that description which requires compensation; (*b*) Does the scheme save it or duly compensate for it. As to (*a*), it is submitted that having regard to the conditions under which the Appellant held office under 20 & 21 Vict. c. 84, he had no vested interest within the meaning of the *Endowed Schools Act*, 1869, which it was the duty of the Commissioners to save or compensate for by their scheme. He held his office at the discretion, *bonâ fide* exercised, of the governors: see *Reg.* v. *Governors of Darlington School* (1). [He referred also to *Reg.* v. *Manchester Railway Company* (2).] [LORD SELBORNE:—We must look at the substance of this matter. You and Mr. *Cotton* represent bodies who have no power to dismiss, or if the governors have power they have not shewn a resolution by a competent majority to exercise it.] It is impossible to estimate the value of an office held at will, during good behaviour, or till the governors have passed a particular resolution under sects. 89 and 90 of 20 & 21 Vict. c. 84. Such an interest is something less than a freehold one, and, at all events, is not an interest within the meaning of sect. 13 of the Act of 1869. As to (*b*), even if he had such vested interest, then, having regard as well to the conditions of the tenure of office by the Appellant under 20 & 21 Vict. c. 84 as also to the financial position and requirements of the educational branch of the charity, there is a sufficient saving or compensation for such vested interest. The Appellant says that but for the temporary agreement his income would be £6000; but, in fact, if the said agreement had not been entered into, due provision could not have been made for the expense of education of the additional number of boys received into the school, and if the Appellant were allowed to enjoy the salary he claims, or anything approaching that amount, or any salary materially larger than that which he has been receiving under the said agreement, the school could not be carried on in such manner as is necessary for its success, and the educational branch of the charity would be reduced to a position of insolvency. Further, the grounds of appeal stated on the other side, so far as they concern the status, authority, and power of the head master, are insufficient; they are, moreover, objections

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(1) 6 Q. B. 682.

(2) 4 E. & B. 103. 1 Jur NS 4

J. C.
1875
In re
ALLEYN'S COLLEGE, DULWICH.

to the merits of the scheme as an educational scheme, and the Appellant is not a person competent to petition against the approval of the scheme on any such ground. It is submitted that the new scheme is within the scope of, and made in conformity to, the *Endowed Schools Act*, 1873 and 1874.

Mr. *Cotton*, Q.C. (Mr. *Rigby* with him), for the governors of the college:—

The governors resist the Appellant's petition on the same grounds as the Charity Commissioners. Several appearances are not entered, nor is opposition made, in order to oppress the Appellant. It is the scheme of the Commissioners, not of the governors, who are in no way responsible for it, though in consideration of its contents they have sanctioned it as best for the school.

Mr. *Finlay*, for the vestry of the parish of *St. Luke*, and for *W. S. Partrick*, an inhabitant and ratepayer of the said parish.

The Appellant was not called on to reply.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

This is a Petition which, being presented since the *Endowed Schools Amendment Act*, 1873, has to be dealt with by their Lordships as if it were an appeal between parties, and their Lordships are required to do what was not usual upon the references made under former Acts, to state in open Court the nature of the report or recommendation which they propose to make to Her Majesty in like manner as in the case of any such appeal. The Petitioner is here in respect of the right of appeal given to him, as he alleges, by the 39th section of the *Endowed Schools Act* of 1869, which, so far as relates to this petition, is thus worded:—" If the governing body of any endowment to which a scheme relates, or any person directly affected by such scheme, feels aggrieved by the scheme on the ground of the scheme not saving or making due compensation for his or their vested interest as required by the Act," then power is given to such person in respect of that grievance to appeal

J. C.
1875

In re ALLEYN'S COLLEGE, DULWICH.

to Her Majesty in Council. It is therefore in respect of the private right of the Petitioner, Dr. *Carver*, and not in respect of any of those considerations of expediency which the Legislature thought fit to delegate to the Commissioners, that their Lordships are now to exercise this jurisdiction. Dr. *Carver* says that he has a vested right, which, under the 13th section of the Act of 1869, ought to have been saved or duly compensated, and that this has not been done in the scheme proposed by the Commissioners. The material words of that scheme are:—"It shall be the duty of the Commissioners to provide in any scheme for saving or making due compensation for the following vested interests." Then are enumerated five different kinds of interests, one of which is in these words:—"Such interest as any teacher or officer in any endowed school appointed to his office before the passing of the *Endowed Schools Act*, 1868, may have." It is not in any way attempted by that part of the section to define the terms of the tenure of the teacher or officer whose interest should be saved or compensated. The words are "such interest as any teacher or officer," appointed before a certain time, "may have." It would be very difficult for their Lordships, having to look to substance and not to form or technicality in such a case, to accede to the argument, that any teacher or officer of a school who had an interest the value and nature of which was defined by Act of Parliament, and who had not been deprived of that interest by any lawful authority, would not be entitled *primâ facie* under that clause to have his interest saved or compensated.

It was argued by Mr. *Fry*, on the part of the Commissioners, that the interest of Dr. *Carver* was not to be regarded as within the meaning of the clause, because, as their Lordships understood him, it was an interest less than freehold, and in some sense (as he said) held at the will, not precisely of the governors acting in the ordinary way by a majority, but of a certain majority at a meeting, constituted in a certain manner and convened in a certain manner, of the governors; no such meeting ever having been convened, and no such majority ever having had existence. Their Lordships are clearly of opinion that the cases which were cited have no application to a question of this nature. One of them did not contain any similar qualifications as to the power of removal, and therefore would be, for this purpose entirely irrelevant. The other, the case of the *Grimsby School,* did contain some similar qualifications, but the question was of a totally different nature. It was whether, under the particular terms of a clause in a Railway Act, the interest in lands held (as the Court assumed for the purpose of decision) by the same tenure by which the office of schoolmaster was held was an interest greater in contemplation of law than an estate from year to year. The Judges held that the office, determinable as it was by certain means at the pleasure of the parties, who, if all the conditions were fulfilled, would have to use those means, was not technically and legally an interest of a larger nature than an estate from year to year. Their Lordships are of opinion that this authority also is wholly irrelevant to the present question; and that in the present case the Legislature has carefully guarded the power of removal, so as to give a very substantial vested interest to this gentleman, until that power shall be lawfully exercised, which it never has been.

The only question, therefore, which remains is whether that interest has been saved or duly compensated by the scheme against which the appeal is made. Now, the interest (putting aside everything else except the pecuniary interest of the Petitioner, for their Lordships are not satisfied that there is anything else material to be considered,) is constituted by Act of Parliament, an Act of Parliament indeed which the Commissioners under the later statute have power to alter, provided the conditions of the later statute are complied with. But if in respect of the saving of the interest of Dr. *Carver* the conditions of the later statute are not complied with, then the original Act of Parliament remains in full force, and his right is a statutory right under an Act of Parliament. That Act of Parliament gives him a title to these emoluments. Under the 49th section he is to have, first of all, a fixed salary or stipend of £400 per annum; and, secondly, a payment of £3 per annum for every boy, exceeding the number of fifty, who shall have *bonâ fide* attended the school for a period of not less than three calendar months during the then preceding half year. By the 59th section power is given to the governors to fix and determine from time to time the amount of capitation fees to be paid by all the boys attending the upper school, except the foundation scholars, those capitation fees being fixed *ad interim* at certain sums varying according to age; and the governors have in point of fact, by virtue of the power then given to them, since increased those sums. That being the power of the governors in respect of capitation fees, the 60th section says, "The annual amount of the capitation fees to be received from the boys as aforesaid shall be paid and applied by the governors as follows: viz., one moiety thereof shall be paid half-yearly to the master of the college." So that he is entitled under those clauses of the Act of Parliament as long as he holds his office, from which he cannot be arbitrarily removed in substance, though he may be removed at the will and pleasure of a certain majority of a meeting called and constituted in a certain manner, to the £400 per annum, the £3 per annnm for every boy above the first fifty, and to one half the capitation fees, whether those fees may be greater or less, which the governors may receive; and as the other half of the capitation fees is applicable to other purposes for which it is the duty of the governors to provide, it cannot be assumed that they will either raise or reduce the amount of those fees from time to time by virtue of the power which they possess arbitrarily, or for any purpose relative only to differences of opinion between themselves and the head master, or in fact for any purpose not in their view conducive to the due execution of their trusts. Turning from those rights which the head master has under the Act of Parliament, the scheme which has been settled by the Commissioners appears to their Lordships most materially to vary them, and in a manner as to which their Lordships certainly cannot assume that the substituted right would be in any way the equivalent of that which would be taken away. In the first place, the scheme by the 88th section of it fixes, either absolutely or relatively to certain rates different from those of the Act of Parliament (for the construction is in that respect controverted), the maximum amount of stipend which Dr. *Carver* personally and individually shall from henceforth receive. He shall receive the fixed stipend of £400 without change, so far as that amount is concerned. The mode of payment and the security for it will have to be noticed afterwards. Then having, as to other and future masters, fixed new rates quite different from and less than those of the Act of Parliament to be paid, according to the number of the boys, it goes on to say that Dr. *Carver* "shall not, so long as he shall continue to be master of *Dulwich College*, receive payment at a lower rate than that at which he received payment in the year ending the 31st of December, 1872." Sir *William Harcourt*, for Dr. *Carver*, suggested that the true interpretation of that provision was, that he should never receive less than the fixed sum of £2307, being the aggregate amount which he received in the year 1872, and *primâ facie* their Lordships were disposed to think that this would be the true interpretation of the clause. On the other hand, it was suggested that this was not so, but that the words "payment at a lower rate," when read in connection with the antecedent words of the same clause, speaking of the rate of so much for each boy, varying according to the number of boys, which future masters were to receive, justified the conclusion that it was intended to refer to a certain conventional rate of payment agreed upon for a limited time, since expired, between Dr. *Carver* and the governors, being a different and a lower rate than that mentioned in the Act of Parliament; under which agreement Dr. *Carver* had consented to receive, and had actually received, the amount paid to him for the year ending the 31st of December, 1872. Whatever may be the true interpretation, and their Lordships do not think it necessary to decide it, the substance is the same; the emoluments of the year 1872, a year when they were governed not by the Act of Parliament, but by a special and temporary convention and agreement between Dr. *Carver* and the governors, are, according to this scheme, to be made the fixed rule for the future remuneration. Their Lordships on that ground only would have been quite prepared to say that Dr. *Carver's* rights are not preserved by the scheme.

But the matter does not rest there, because, by an earlier section of the scheme, the 20th, a new destination of the endowment funds of the college is proposed, which carries off to perfectly new objects distinct from the upper school a sum estimated on both sides at £3000 a year, or thereabouts, which, but for that new destination, would be applicable to the payment of Dr. *Carver's* statutory stipend under the 49th section, that is, the £400 a year, and the £3 a year for every boy beyond the first fifty. It proposes to make that £3000 for other purposes (purposes altogether foreign to the school), a new first charge before anything is to be applied to the payment of Dr. *Carver's* salary; and it in fact leaves as applicable to the school under any circumstances, out of the endowment fund, only £1400 a year for exhibitions, as a maximum, besides certain repairs and such annual sum to be paid to Dr. *Carver* while he continues master of the college as may be equal to the excess of the annual income by the scheme secured to him as master of the college over the annual sum by the same scheme directed to be paid to any future master of the college. Their Lordships are by no means satisfied that, in the state of the finances of the college which is disclosed by the papers before them, there would not be a substantial interference with the security given by the existing Act of Parliament to Dr. *Carver* for the payment of what is from time to time due to him, as well as a substantial alteration by the other clause, the 88th, of the amount which he is entitled to receive. It is said that, looking to the past, and to the necessity which has been found for encroaching by his own consent on the payments which he would have been entitled to under the Act of Parliament, in order to provide a proper staff of assistant masters for the school and exhibitions—it is said that, looking to those circumstances, it may reasonably be concluded that whatever is offered him by the scheme is an equivalent, and as was put in argument, "due compensation" for what is taken away from him. Their Lordships cannot come to that conclusion when they find that for those purposes, for which by his consent his rights have hitherto been waived, there has been available hitherto the sum of £3000, which it is now proposed to take away and divert to totally different purposes. Looking at the whole substance of the case, as well as according to the strict letter of his rights, their Lordships are satisfied that Dr. *Carver's* rights are not saved by this scheme. As to due compensation being made for them, their Lordships are not satisfied that this is a case within that part of the clause at all. If he had been deprived of his mastership by the scheme, it would have been a case for compensation, but as he is continued master, their Lordships apprehend it is a case for the saving of his rights; if, however, it were proper to consider that in such a case as this due compensation might be made for rights partially taken away while in other respects they remain, their Lordships would still be of opinion, for the reasons which have been given, that due compensation is not made by this scheme.

Under these circumstances their Lordships will humbly advise Her Majesty to declare that the petitioner, Dr. *Carver*, has a vested interest in his office and in the emoluments thereof within the meaning of the 13th section of the *Endowed Schools Act* of 1869, and that such interest is not saved, nor is due compensation made for the same, by the scheme of the Charity Commissioners, and with that declaration their Lordships will humbly advise Her Majesty to remit the scheme to the Commissioners.

The only question which remains is that of costs. Their Lordships say nothing about the costs of any of the Respondents, but they think that Dr. *Carver's* costs ought to be paid by the governors out of the funds of the charity in their hands.

Solicitors for the Appellant: *Bridger & Collins.*

Solicitors for the Charity Commissioners: *Farrer, Ouvry, & Co.*

Solicitors for the Governors of the College: *A. D. Druce.*

Solicitors for the Vestry of St. Luke's: *W. W. Hayne & W. S. Partrick.*

[PRIVY COUNCIL.]

J. C.*

1876

Feb. 4, 5.

SIR JOHN O'SHANASSY . . . . DEFENDANT;

AND

JOHN THOMAS JOACHIM . . . . PLAINTIFF.

SIR JOHN O'SHANASSY . . . . DEFENDANT;

AND

SELINA JOACHIM . . . . PLAINTIFF.

SIR JOHN O'SHANASSY . . . . DEFENDANT;

AND

SOPHIA JOACHIM . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands Alienation Act, 1861, s. 13—*Grants to Minors.*

A grant of Crown land made by the Governor of *New South Wales* under the *Crown Lands Alienation Act*, 1861, to a person under the age of twenty-one is not necessarily null and void to all intents and purposes.

Quære, whether the Governor would be bound to accept an application under that Act from an infant of so tender years as to be incapable of subscribing the necessary form, or of exercising any judgment, or even understanding the question with which it had to deal.

The words "any person" in sect. 13 of the said Act need not necessarily be restricted to all persons above the age of twenty-one.

THE question raised in the above-named three consolidated appeals from three orders of the Superior Court of *New South Wales* (respectively dated the 15th of June, 1874), was, whether the Respondents, being minors or infants of the respective ages of sixteen, fourteen, and twelve years, could become conditional purchasers of Crown lands under the *Crown Lands Alienation Act*, 1861 (25 Vict. No. 1). The orders refused a rule *nisi*, calling on the Respondents to shew cause why the verdicts which they had obtained in their several actions should not be set aside and a nonsuit entered.

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C
1876
O'SHANASSY
v.
JOACHIM.

On and previously to the 20th of February, 1873, the Appellant was in possession of certain Crown lands, situate in the parish of *Bama, New South Wales,* claiming to be in possession thereof as pastoral tenant, under promise of a lease from the Crown in accordance with the *Crown Lands Occupation Act,* 1861 (25 Vict. No. 2); by sect. 28 of which Act it is provided that such a promise shall, as between the parties to any action of trespass, have the same effect as if a lease from the Crown had been duly issued.

Written applications under the 13th section of the *Crown Lands Alienation Act,* 1861, in the names of the Respondents, and of other infant children of *William Joachim* (each application being for a different parcel of land) for the conditional purchase of separate portions of the said Crown lands, were tendered by *William Joachim* to the land agent for the district in which such lands were situated, *William Joachim* in the matter of these applications professing to act as the agent of his infant children, and paying as on their behalf the deposit of 25 per centum required by the said section.

In the year 1873 three actions, each action being in the name of one of the three Respondents, were brought against the Appellant, the Plaintiff in each action suing by the said *William Joachim* as his or her next friend.

The declaration in each action alleged that the Appellant broke and entered certain land of the Plaintiff. The Appellant pleaded to each declaration, first, a plea of "Not guilty;" and, secondly, a plea that the land was Crown land, and that at the time of the alleged trespasses the Appellant was in occupation and enjoyment of the land by virtue of a promise, engagement, and contract, by an agent of the Crown, lawfully authorized in that behalf.

The last plea was pleaded under the provisions of the 28th section of the *Crown Lands Occupation Act,* 1861, which is as follows:—

"In any action or suit brought to recover possession or to recover damages for trespass upon or otherwise in relation to any Crown lands of which no lease from the Crown shall be in force, it shall be lawful for any party thereto to plead and put in evidence any promise, engagement, or contract from or with the Crown or its agents, lawfully authorized for the granting under the Orders in Council, or under the Act, for any term unexpired of a lease of such lands, and such promise, engagement, or contract shall, as between the parties in such action or suit, have the same effect as if a lease from the Crown of such lands had been duly issued in pursuance of such promise, engagement, or contract to the party entitled thereunder to such lease."

The actions were tried before Sir *James Martin*, the Chief Justice. The facts were admitted as above stated, and thereupon a verdict was taken by consent for the Plaintiff in each action, with damages £100, leave being reserved to the Appellant to move to set aside the verdict and enter a nonsuit.

On the 15th of June, 1874, the Appellant moved in each of the three actions for a rule *nisi*, calling on the Plaintiff therein to shew cause why the verdict should not be set aside, and a nonsuit entered, on the grounds reserved by the Chief Justice at the trial, namely: "First, that at the time of the alleged conditional purchase the Plaintiff was an infant. Secondly, that the alleged conditional purchase was not made by the Plaintiff, but by *William Joachim*, the Plaintiff's father, acting as the Plaintiff's agent, whereas the Plaintiff, being an infant, could not appoint an agent for such a purpose."

Such rule was refused.

Acts 25 Vict. No. 1 and No. 2, were passed on the same day,—the 18th of October, 1861; the material sections of the former Act are as follows:—

"13. On and from the 1st day of January, 1862, crown lands, [*as described in the section*], shall be opened for conditional sale by selection in the manner following (that is to say):—Any person may upon any land-office day tender to the land agent for the district a written application for the conditional purchase of any such lands, not less than 40 acres, nor more than 320 acres, at the price of 20*s*. per acre, and may pay to such land agent a deposit of 25 per centum of the purchase-money thereof. And if no other like application and deposit for the same land be tendered at the same time, such person shall be declared the conditional purchaser thereof at the price aforesaid. Provided that if more than one such application and deposit for the same land, or any part thereof, shall be tendered at the same time to such land agent, he shall, unless all such applications but one be immediately withdrawn forthwith, proceed to determine by lot in such manner as may be prescribed by regulations made under this Act which of the applicants shall become the purchaser."

"16. If at the time of conditional purchase of any Crown land under sects. 13 and 14 of this Act such land shall not have been surveyed by the Government, temporary boundaries thereof shall be determined by the conditional purchaser, who shall within one month after such time of purchase occupy the land; and any dispute between such purchaser and any other person other than a holder in fee or his alienee claiming any interest therein respecting such boundaries shall be settled by arbitration: Provided that if such land shall not be surveyed by the Government within twelve months from the date of application it shall be lawful for the conditional purchaser by notice in writing to the land agent for the district to withdraw his application, and thereupon he shall be entitled to demand and recover back any deposit paid by him, or the purchaser shall have the option of having the land surveyed by a duly qualified licensed surveyor, and the expense of such survey shall be allowed to such purchaser as part payment of his purchase-money, such expense to be allowed in accordance with the scale of charges fixed, or to be fixed, by the Surveyor-General."

"18. At the expiration of three years from the date of conditional purchase of any such land as aforesaid, or within three months thereafter, the balance of the purchase-money shall be tendered at the office of the Colonial Treasurer, together with a declaration by the conditional purchaser or his alienee, or some other person in the opinion of the Minister competent in that behalf, under the Act 9 Vict. No. 9, to the effect that improvements as hereinbefore defined have been made upon such land, specifying the nature, extent, and value of such improvements, and that such land has been from the date of occupation the *bonâ fide* residence either continuously of the original purchaser, or of some alienee or successive alienees of his whole estate and interest therein, and that no such alienation has been made by any holder thereof until after the *bonâ fide* residence thereon of such holder for one whole year at the least. And upon the Minister being satisfied by such declaration and the certificate of the land agent for the district or other proper officer of the facts aforesaid, the Colonial Treasurer shall receive and acknowledge the remaining purchase-money, and a grant of the fee simple, but with reservation of any minerals which the land may contain, shall be made to the then rightful owner: Provided that should such lands have been occupied and improved as aforesaid, and should interest at the rate of five per centum per annum on the balance of the purchase-money be paid within the said three months to the Colonial Treasurer, the payment of such balance may be deferred to a period within three months after the 1st day of January then next ensuing, and may be so deferred from year to year by payment of such interest during the first quarter of each year. But on default of a compliance with the requirements of this section the land shall revert to Her Majesty, and be liable to be sold at auction, and the deposit shall be forfeited."

Mr. *Joseph Brown*, Q.C., and Mr. *J. D. Wood*, for the Appellant:—

No person can become a conditional purchaser under the *Crown Lands Alienation Act*, 1861, unless he is a person who can tender a written application and make a payment as required by sect. 13; who can have a dispute with another person and join with him in an arbitration, withdraw an application by a notice in writing and exercise an option under sect. 16; and who can make and tender a declaration, alienate land, and *bonâ fide* reside on the land, as contemplated by sect. 18. It is contended that the Respondents, as infants, are incapable of doing any, or, at all events, all of the acts above enumerated, and, therefore, that the Legislature could not have contemplated that they should become conditional purchasers under the Act. In *Drinkwater* v. *Arthur* (1) no doubt a majority of the Judges held against the opinion of the Chief Justice that an infant of any age, however tender, was capable of being a conditional purchaser, one of the Judges so deciding solely on the supposed authority of *Emery* v. *Barclay* (2). In that case, however, the question of an infant's capacity in this respect was not argued, though the Plaintiff therein was in fact an infant; but an opinion is attributed to the Court, said to have been expressed before argument took place, that a selection might be made by a person under twenty-one years, and by a father in the name of his son. So far, therefore, as the decision in *Drinkwater* v. *Arthur* proceeded on the authority of *Emery* v. *Barclay*, it was based on a misconception. Here the grant is a void grant, for the Act does

(1) 10 Supreme Court Rep. 193.

(2) 8 Supreme Court Rep. 374.

not authorize a grant to an infant. [SIR MONTAGUE E. SMITH:—That is a serious contention; a man might have supposed himself twenty-one, the government having exercised a discretion and accepted the selection.] An infant cannot make a conditional purchase: see *Baylis* v. *Dineley* (1). *Merry* v. *Nickalls* (2) was also referred to. The words "any person" in a statute can never be held to remove disability: see *Maxwell's* Interpretation of Statutes, pp. 61, 66, 68. An infant cannot do all the things required by the Act. [SIR BARNES PEACOCK:—Yes, he can, though he may avoid his contracts when he comes of age; he can nevertheless contract for his own advantage. SIR MONTAGUE E. SMITH:—If he may purchase under the Act his capacity to do all the rest would follow.] The Act contemplates selection by a person who can alienate: see sects. 13, 18. No valid conveyance, at all events, can be made till the infant comes of age: see *Sugden's* Vendors and Purchasers [10th ed.], vol. ii. p. 222, and [14th ed.] p. 398. [SIR ROBERT P. COLLIER:—Suppose the infant purchased, could he not bring an action of trespass? SIR MONTAGUE E. SMITH:—Suppose an infant buys a reversion, and that the lease expires before he comes of age, can he not eject?] It is implied in the Act that an infant should not be a purchaser, and even if a distinction is to be drawn between the capacity to purchase of infants of tender years and infants of more mature years, yet the decision in this case proceeded on the ground that all infants, no matter what their age, may be conditional purchasers, and such decision ought to be reversed. They referred also to Act 39 Vict. No. 13, sects. 6, 9, and 11, the effect of which was to validate by subsequent enactment all selections theretofore made in the name of infants, except in cases where litigation was actually pending.

The Respondents did not appear.

The judgment of their Lordships was delivered by

1876
Feb. 5.

SIR ROBERT P. COLLIER:—

Three infants of the name of *Joachim*, of the ages respectively of sixteen, fourteen, and twelve years, brought separate actions in which they complained that the Defendant had trespassed upon their closes. They claimed their land under grants made by the

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(1) 3 M. & S. 477.

(2) Law Rep. 7 Ch. Ap. 748, 749, and Law Rep. 7 H. L. 545, 548.

Governor in pursuance of the *Crown Lands Alienation Act*, 1861. The only defence which is now insisted upon is that the grants to the Plaintiffs were absolutely null and void, inasmuch as when those grants were made they were under the age of twenty-one years. The question would undoubtedly be one of very great importance and wide application in the colony, were it not for a recent statute which has decided it with respect to all cases except those pending at the time of the passing of the Act; the Act affirming the validity of all grants to infants of whatever age before its passing, and of all subsequent grants to infants of and above the age of sixteen years.

Upon an application which was made in pursuance of leave reserved to enter a verdict for the Plaintiff on the ground that the grants were void because the Plaintiffs were under twenty-one, the Court refused to grant the rule *nisi*, on the ground that the question had already been decided in the colony, in the two cases which have been referred to at the Bar. The first case was a case of *Emery* v. *Barclay* (1), decided in 1869, in the report of which this statement occurs:—" The Court were agreed in the opinion that a selection might be made by a person under twenty-one years, and by a father in the name of his son." It is true that the Chief Justice, Sir *Alfred Stephen*, said in a subsequent case that the point was not argued, but was decided, as it were, incidentally and without much consideration. At the same time, the case as reported appears to have been understood in the colony as deciding this point, and their Lordships cannot doubt that Mr. Justice *Hargrave* is right in saying that a good deal of land was purchased upon the strength of that decision, and that many titles may have depended upon it.

The subsequent case was decided in 1871. It was a case of *Drinkwater* v. *Arthur* (2), in which one of the questions was whether an infant of the age of three and a half years was capable of taking land under the Act referred to. The Chief Justice held that an infant of that age was not capable, on the ground apparently that it was of too tender age to be able to execute the necessary documents, or even to form any understanding of the transaction; but it is to be observed that the Chief Justice then expressed an opinion that an infant of the age of sixteen or thereabouts would be capable of labouring, capable of occupying the ground, and capable of understanding the nature of the transaction in which he was engaged, and would therefore be capable of taking under the Act. The other two Judges decided that the infant was capable, Mr. Justice *Cheeke* no doubt considering himself bound by the former decision. That was in 1871, and from that time until these actions were brought, the doctrine so laid down would not appear to have been questioned; and their Lordships must treat it as having been laid down by a course of decisions in the colony.

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(1) 8 Supreme Court Rep. 374.

(2) 10 Supreme Court Rep. 193.

Their Lordships are now asked to reverse these decisions, and the ground on which they are said to be wrong is, in effect, that the sections of the *Crown Lands Alienation Act* which have been a good deal referred to, chiefly the 13th, the 16th, and the 18th, impose upon the person who is to apply, and who is to be the conditional purchaser, several obligations, such as the making of a written application, the payment of money by way of deposit, the ascertaining the temporary boundaries, the exercising of an option of whether to withdraw his application or to have the land remeasured, and at the end of three years the duty of improving the land, without which improvements it would be forfeited.

Undoubtedly there is a good deal of force in the arguments which have been drawn from these provisions, and their Lordships would be disposed to give them very great weight if the question before them was, whether the Governor would be bound to accept an application from an infant of so tender years as to be incapable of subscribing the necessary form, or of exercising any judgment, or even understanding the question with which it had to deal. It may be that the governor would be justified in refusing such an application. It may also be that the Governor might repudiate such a transaction, if it were entered into, on the ground that the Crown had been imposed upon in its grant, or that the grant "*improvide emanavit.*" These, however, are not the questions which are before their Lordships. The Defendant has to make out, not merely that the Governor might exercise or might not exercise an option of refusing applications under certain circumstances, but he has to go the length of satisfying their Lordships that the word "person" used in sect. 13 must be limited to persons above the age of twenty-one, and that any grant made to any person under that age is void, although he may be of years suffi-

J. C.
1876

O'SHANASSY
v.
JOACHIM.

cient to reside on and cultivate the land, and to execute improvements, and to be able to decide for himself as to whether he should or should not exercise the option referred to; the Defendant has to satisfy their Lordships that the word "person" must necessarily be restricted to all persons above twenty-one, and that a grant made to any person under twenty-one, no matter how near he may be to that age, is so completely null and void that a stranger can take advantage of it in order to excuse a trespass.

Although their Lordships have not been entirely free from difficulty in considering this question, they have come to the conclusion that the Defendant has not established that which he had to make out. He has not satisfied their Lordships that they ought to reverse a series of decisions in the colony, and to lay down that a grant made to any person under the age of twenty-one is necessarily void to all intents and purposes. It has been, indeed, contended on the part of the Appellant that the meaning of the word "person" in the sections above referred to must be somewhat restricted, and cannot be held to have the effect of enabling any person to take who could not previously take a grant of Crown lands, and so far their Lordships are disposed to agree with the view of the counsel for the Appellant; but it is to be observed that the construction which they put upon the clauses does not enlarge the powers of infants, inasmuch as before the passing of the Act the Crown might grant to infants, and infants might take.

On the whole, their Lordships think that no sufficient case has been made out to satisfy them that the Court was wrong, and to reverse decisions which have been acted upon for several years, and under these circumstances they will humbly advise Her Majesty to dismiss this appeal.

A printed case was lodged on behalf of the Respondents, although they did not appear by counsel at the Bar on the hearing. Under these circumstances their Lordships will direct that the Respondents should be allowed their costs down to the lodging of their case, inclusive. This sum will be paid to them out of the sum deposited by the Appellant in the Registry as security for the costs of the appeal.

Solicitors for the Appellant: *Peachey & Lloyd.*
Solicitors for the Respondents: *Burton, Yeates, & Hart.*

[PRIVY COUNCIL.]

J. C.*
1875
Dec. 1, 2.
1876
Feb. 5.

THE MAYOR OF LYONS . . . . . . PLAINTIFF;

AND

THE ADVOCATE-GENERAL OF BENGAL AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Will—Gift to Charity which has ceased to exist—Application of Cy-près Doctrine, when the Residuary Bequest is also to Charity.

C. B., a Frenchman, by an English will, dated the 1st of January, 1801, bequeathed his property, valued by himself at upwards of 30 lacs, partly to individual legatees, more largely to various charitable objects, the most prominent being certain establishments in *Lucknow*, *Calcutta*, and *Lyons*. His estate was administered and various questions under his will disposed of in several suits instituted for those purposes in the Supreme Court at *Calcutta*. Among the charitable bequests were the three following legacies: 1, by the 28th clause the annual sums of Rs.5000 and Rs.1000, to be applied respectively to the discharge and relief of poor debtors detained in prison in *Calcutta*; 2, by the 25th clause the annual sum of Rs.4000 to be paid to the magistrates of *Lyons* to liberate poor prisoners detained for debt in *Lyons*. This fund was, before 1832, fully paid over to the Mayor and Commonalty of *Lyons*. 3. By the 33rd clause the annual sum of Rs.4000, to be paid to liberate poor prisoners at *Lucknow*, but with a direction that "if none, that sum is to remain to the estate." This gift was, by a decree of the Supreme Court in 1832, declared to be void, and the residuary estate was increased by the amount which would have been required to satisfy it.

A scheme was settled in 1802 for the administration of the charities for the release and relief of poor prisoners at *Calcutta* comprised in the first-mentioned legacy, and funds to satisfy the same were, by orders of the Supreme Court, transferred to the credit of two separate accounts for those several purposes. The income of these funds in excess of what was required for poor prisoners at *Calcutta* accumulated; and in August, 1865, had amounted to Rs.351,000. The residuary clause of the will (the 33rd) directed that "after the several payments of gift and others, as also the several establishments, if a surplus of ten lacs remains, that above surplus is to be divided in such a manner as to increase the three establishments."

On a petition by the Advocate-General, without citing the Appellant, the High Court on the 3rd of August, 1865, made an order (confirmed by another order of the 2nd of March, 1866), under which a sum of Rs.150,000 was reserved in an account for the relief and release of poor prisoners at

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.
1875-6

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

Calcutta as above, the income to be applied on the *cy-près* principle "in lieu and supersession of the former scheme;" and the residue of the said accumulation was divided between the *Calcutta* and the *Lucknow Martinière* establishments.

On a petition by the Appellant to the High Court, dated the 21st of June, 1873, praying that it might be declared that the said gifts of Rs.5000 and Rs.1000 annually for the release and relief of prisoners in *Calcutta* had failed; that the said accumulations formed part of the residue of the testator's estate; and that the Petitioner, as a residuary legatee, was entitled to a share thereof: the High Court refused the petition, holding "that the said charitable gift was an absolute charitable gift capable of being applied *cy-près;* and that the Petitioner, as one of the residuary legatees under the will, was not entitled to any of the funds appropriated to that gift":—

Held, by their Lordships, that this order must be affirmed.

It cannot be laid down as a general principle that the *cy-près* doctrine is invariably displaced when the residuary bequest is to charity.

The jurisdiction of the Court to act on the *cy-près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

Such a direction cannot be implied from the terms of the above legacies to poor prisoners in *Calcutta* and *Lyons*, especially when compared with the corresponding gift to the prisoners at *Lucknow*, nor can it be inferred from the residuary clause, which in terms disposes of such residue as is left after providing for the said legacies.

THIS was an appeal from an order of the High Court at *Bengal*, dated the 10th of September, 1873, and made in certain causes instituted for the purpose of administering the trusts of the will of Major-General *Claude Martin*, whereby the Court refused an application on the part of the Mayor of *Lyons*, as representing one of the residuary legatees, to the effect that a fund devoted to charity by the testator's will might, in consequence of the particular object pointed out by the testator having failed, be divided amongst the residuary legatees.

Major-General *Claude Martin* was a Frenchman by birth. He was born at *Lyons* in 1735. Early in life he went to the *East Indies* as a common soldier in the French army. In 1763 he transferred his services to the *East India Company* on condition of not being required to serve against his countrymen, and he rose to high rank in the Company's employ. In 1776 he was attached to the military service of the Nawab Vizier of *Lucknow*, and thenceforth he remained in the Nawab's service until near the time of his death. He died on the 30th of September, 1801, having amassed a large fortune, the greater part of which he devoted by his will to charitable purposes.

The said will, dated the 1st of January, 1801, (as the same has been construed in various decrees and orders) contained, among others, dispositions to the following effect: A gift of Rs.5000 per annum for the release of imprisoned debtors at *Calcutta*, and a gift of Rs.1000 per annum for the relief of such prisoners. Also three bequests to found charities at *Calcutta*, at *Lyons*, and at *Lucknow*, respectively. And a gift of the residue equally between the said three charities at *Calcutta, Lyons*, and *Lucknow*. The two bequests for the release and relief of prisoners having failed for want of objects of the charity, the question raised in this appeal was whether the fund thereby set free ought to be divided between the three residuary charities, or applied *cy-près* in the manner directed by the order appealed from, which was in substance a distribution for the benefit of the *Calcutta* and *Lucknow* charities, and for the benefit of convicts on their release from jail at *Calcutta*, to the exclusion of the *Lyons* charity.

The will was divided into thirty-four articles, of which those most material on the questions arising on this appeal are the following:—

The 23rd article contained a bequest of Rs.150,000, to be invested, and the income applied for the relief of the poor of *Lucknow, Calcutta*, and *Chandernagore*.

The 24th article was as follows: "I give and bequeath the sum of 200,000 sicca rupees to the town of *Calcutta*, to be put at interest in government paper, or the most secure mode possible, and this principle and interest to be put under the protection of Government or the Supreme Court, that they may devise an institution the most necessary for the public good of the town of *Calcutta*, or establishing a school for to educate a certain number of children of any sex to a certain age, and to have them put prentice to some profession when at the conclusion of their school, and to have them married when at age; and I also wishes that every year premium of few rupees or other thing, and a medal, be given as to the most deserving or virtuous boy or girl, or both, to such that have come out of that school, or that are still in it, and this to be done on the same day in the month I died, that day those that are to be married are to be married, and to have a sermon preached at the church to the boy and girl of the school, afterwards a public dinner for the whole, and a toast to be drink'd in memorandum of the *fondator.* This institution is to bear the title of *La Martinière,* and to have an inscription, either on stones or marble, in large character, to be fixed to any part of the school, on it wrote instituted by Major-General *Martin,* borne the of January, 1735, at *Lyon,* who died the day, month, and year (mentioning the day, month, and year) and buried at (mentioning the place); and as I am little able to make any arrangement for such an institution, I am in hope Government or the Supreme Court will devise the best institution for the public good, and to have it, as I said above-mentioned, the name of the institutor, after every article of my or this will and testament is or are fully settled, and every articles provided and paid for the several pension or other gift, donation, institution, and other any sum remaining may be made to serve—first, buy or build a house for the institution, as that it may be made permanent and perpetual by securing the interest by government paper, either in *India* or *Europe,* that the interest annually may support the institution; for this reasons I give and bequeath 150,000 sicca rupees more according to the proportion that may remain after every articles of this testament is fulfilled, then this sum to be added for the permanency of that institution, making the sum of 350,000 sicca rupees."

The 25th article was as follows: "I give and bequeath the sum of 200,000 sicca rupees to be deposited in the most secure interest fund in the town of *Lyon,* in *France,* and the magistrates of that town to have it managed under theirs protection and control; that above-mentioned sum is to be placed, as I said, in a stock or fund bearing interest, that interest is to serve to establish an institution for the public benefit of that town; and the Academy of *Lyon* are to devise the best institution that can be permanently supported with the interest accruing of the above-named sum; and, if no better, to follow the one devised in the Article 24th as at *Lucknow;* the institution to bear the name of *Martinière,* and to have an inscription made at the house of the institution mentioning the same title as the one of *Calcutta,* and this institution to be established at the *Place St. Pierre—St. Safurinn* being where I had been christened—there at that place to buy or build a house for that purpose; and to marry two girls every year, to each 200 livres tournois, besides paying about 100 livres for the marriage and fest of each of those who married; or if the institution, such as the *Lucknow* one, educating a certain number of boy and girl, then they are to have a sermon and a dinner for the schools-boys and those who are married, and they are to drink a toast in memory of the institutor; and a medial is to be given of the value of 50 livres, with a premium in cash, or in kind, to be about 200 livres to the boy or girl that has been the most virtuous and behaved better during the course of the year; and also to have a premium of the value of 100 livres for the second that behave better, and also a third premium of about 60 livres for the third that behave better. I am in hope that the magistrate of the town will protect the institution; and in case the sum above allowed of 200,000 sicca rupees is not sufficient for a proper interest to support the institution, and buying or building the house, then I give and bequeath an additional sum of 50,000 sicca rupees, making 250,000 sicca rupees. One of my male relations residing at *Lyon* may be made administrator or executor, joined with any one appointed by the magistrate, to be manager of the said institution; and these managers are to have an œconomical commission for their trouble, taken from the interest of the sum above-mentioned. I also give and bequeath the sum of 4000 sicca rupees to be paid to the magistrates of the town of *Lyon*, for to liberate from the prison so many prisoner as it may extend, such that are detained for small debt; and this liberation is to be made the day of month I died, as that the remembrance of the donor may be known, and my name, Major-General *Martin*, is the institutor; and as given and bequeathed the sum of 4000 sicca rupees for to liberate some poor prisoners as far as that sum can afforded; this I mention to have it made known, as that if neglected that some charitable men may acquaint the magistrate of the town of *Lyon*, as that they might oblige my executor, administrator, or assigns to pay the sum above said, and be more regular in their payments."

The 28th article was as follows: "I give and bequeath the sum of 5000 sicca rupees to be paid annually to the magistrates, or Supreme Court of *Calcutta*, or to Government. This sum is to serve to pay the debt of some poor honest debtor, detained in jail for small sum, and to pay as many small debt and liberate as many debtor as the sum can extend; this liberation is to be made the day month I died, as a commemoration of the donor, and as being a soldier, I would wish to prefer liberating any poor officers or other military men detained for small debt, preferable to any other. And I also give and bequeath the sum of 1000 sicca rupees to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail on the same day as the one mentioned above, both sums making Rs.6000 every year."

The material portion of the 33rd or residuary article is set out in the judgment of their Lordships.

For the purpose of carrying into execution the trusts of the said will, five suits were instituted in the late Supreme Court of Judicature at *Fort William* in *Bengal*. These suits were as follows:—

First.—*Uvedale* v. *Palmer*, which related, among other things, to the prisoners' charity, *vide* Article 28. Second.—*Advocate General* v. *Palmer*. The bill was filed the 20th of June, 1816, for the purpose of carrying into effect the directions contained in the 24th article of the said will (being directions relative to the establishment of what is now known as the *Calcutta* Branch of *La Martinière*). Third.—*Mayor of Lyons* v. *Palmer*. The bill was filed the 26th of August, 1818, for, amongst other things, an account of the personal estate of the testator, and that the residue might be ascertained, and the city of *Lyons* declared entitled to one-third thereof under the 33rd article of the will. Fourth.—*Martin* v. *Advocate General*. The bill was filed the 22nd of October, 1818, for an account of the real estates of the testator, and for establishing the alleged right of the Plaintiffs to so much of the testator's estate as was undisposed of. Fifth.—*Palmer* v. *Martin*. A cross suit. The bill was filed the 19th of February, 1819, for divers accounts.

By an order of the 11th of November, 1802, in the cause of *Uvedale* v. *Palmer*, a scheme was established by the Supreme Court for the administration of the said charities for the release

J. C.
1875–6
MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

and relief of poor prisoners at *Calcutta*, and under various orders funds were carried over out of the testator's general estate to answer the said charities to the credit of two separate accounts, entitled "General *Claude Martin's* Fund for the *Release* of Prisoners," and "General *Claude Martin's* Fund for the *Relief* of Prisoners," and the income of such funds not required for the said charities accumulated from time to time, and at the date of the petition of the Advocate-General of the 3rd of August, 1865, hereafter referred to, there were standing to the said account in *India* 5 per cent. and 4 per cent. *India* paper and cash sums amounting in the aggregate to about Rs.351,000 accumulation at the date of the order of the 10th of September, 1873, the subject of this appeal.

By a decree dated the 16th of August, 1819, the causes were consolidated, and certain accounts were referred to the Master, whose report, dated the 25th of November, 1822, was confirmed on the 29th of November, 1822.

A decree was made on the 2nd of December, 1822, in pursuance of which the Master made his general report on the 3rd of February, 1830, to which the then mayor of *Lyons* took certain exceptions, which were, on the 1st of March, 1830, allowed, and there was a further reference to the Master, who made his amended report on the 19th of July, 1830, and such amended report was duly confirmed.

On the 7th of February, 1831, a decree on further directions was pronounced. In due course the said causes came on to be re-heard, and on the 23rd of February, 1832, the Court varied the order made on the 7th of February, 1831, and, among other things, decreed and declared that the testator, being an alien, certain lands and houses in *Calcutta* could not pass by his will, and that the meaning of the testator in the will was that payment of his debts and legacies should first be made, and a sufficient sum should be set apart and secured for the payment of the several pensions, and for the completing and maintaining of the several buildings, charitable institutions, and establishments in the will mentioned, or so many of them as could be lawfully and effectually established and maintained, and for the payment of all salaries, wages, and allowance in the will provided for supervisors, servants, and other persons to be employed in and about the buildings, institutions, and establishments, or any of them; and that, after making all such payments and provisions, if it should be found that the sum remaining would exceed 10 lacs of rupees, the whole of such surplus should be divided into three equal portions, which should be respectively appropriated and applied as far as they could be lawfully applied to the same charitable institutions, establishments, and uses at *Calcutta*, *Lyons*, and *Lucknow*, to which certain other sums were bequeathed and made applicable by the preceding provisions of the will, and if it should be found at the time of the testator's death that the sum so remaining, after making all such payments and provisions as aforesaid, should be less than 10 lacs, then that it should be kept at interest upon government securities until it should amount to the sum of 10 lacs, when the whole should be divided and applied in the same way and for the same purposes, as it hath been stated, that it was the intention of the testator in the aforementioned case that the surplus, if it should at first exceed 10 lacs, should be divided and applied. And the said decree also decreed and declared that the sum of Rs.150,000, by the 23rd article of the will bequeathed to the poor of *Calcutta*, *Chandernagore*, and *Lucknow;* and a further sum to provide for the payment annually of the sum of 5000 sicca rupees, and of 1000 sicca rupees directed by the 28th article of the will to be paid annually for the release and relief of prisoners for debt, at *Calcutta*, some time before the said decree of the 22nd December, 1822, were paid by *John Palmer*, one of the executors aforementioned, into the hands of the Accountant-General of this Court, under an order of this Court in the cause of *Uvedale* v. *Palmer*.

And decreed and declared that a sum amounting with interest to Rs.312,097 had been carried to a separate account to provide for certain pensions and allowances bequeathed by the will.

And decreed and declared that the sums of Rs.200,000 and Rs.150,000, bequeathed for a charitable institution at *Calcutta*, with interest thereon, had been carried to a separate account.

And decreed and declared that the sum of Rs.250,000, bequeathed for a charitable institution at *Lyons* by the 25th article of the will, with interest thereon, and a sum sufficient to satisfy the

J. C.
1875-6

MAYOR OF
LYONS
v.
ADVOCATE-
GENERAL
OF BENGAL.

bequest of Rs.4000 per annum for the liberation of prisoners at *Lyons* had been paid to the Mayor and Commonalty of *Lyons.*

And decreed and declared that the form of the government at *Lucknow,* and the circumstances of that country, made it impossible that any effect should be given to the bequest, in the 33rd article of the will, of Rs.4000 per annum for the liberation of prisoners at *Lucknow,* and that such bequest was consequently void, and that the Court was incompetent by itself to give effect to the other charitable bequests at *Lucknow,* being a place beyond the jurisdiction of the Court, but that the Governor-General in Council had the means to give effect thereto, and that the sum of Rs.200,000 bequeathed in the 33rd article ought to be paid to the Governor-General in Council, and that a further sum of Rs.100,000 for the college and school at *Lucknow* ought to be set apart, and the interest paid to the Governor-General in Council, and that certain further sums therein mentioned ought to be set apart and the interest paid to the Governor-General in Council for salaries, allowances, and expenses connected with *Constantia House.* And it was referred to the Master, among other things, to inquire and report what surplus remained out of the funds standing to the general credit of the causes, after making provision for all the payments, reservations, and appropriations to separate accounts and other matters and things by the decree ordered, directed, or declared.

Appeals were presented against the said decree to Her Majesty in Council, and by the Report of the Judicial Committee dated the 22nd of February, 1837, various points were set forth upon which the said decree ought to be reversed or varied, and, among others, the declaration that the said land and houses at *Calcutta* did not pass by the will; and the declaration as to the *Lucknow Martinière Charity* was reversed, and another declaration substituted; and in all other respects, including the declaration hereinbefore stated as to the intent and meaning of the testator's residuary disposition, and the declaration that the gift of Rs.4000 per annum for the liberation of prisoners for debt at *Lucknow* was void, the said decree was affirmed.

By a decree of the Supreme Court of Judicature at *Fort William,* in *Bengal,* in these causes, dated the 14th of November, 1837,

J. C.
1875-6
MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.

the variations specified by the report of the Judicial Committee of the Privy Council were embodied in the shape of a further decree, and in all other respects, including the declaration as to the intent and meaning of the residuary disposition, and the declaration that the gift of Rs.4000 per annum for the liberation of prisoners at *Lucknow* was void, the decree of the 23rd of February, 1832, was confirmed and established.

By a decree of the Supreme Court dated the 11th of April, 1839, after reciting the various sums which had been carried to separate accounts, and giving various directions relating thereto, it was declared that the residue, and the costs (if exceeding 10 lacs), was, according to the decree and order of the Privy Council, applicable to the increase of the charities at *Calcutta*, *Lyons*, and *Lucknow*, in equal shares.

By a decree dated the 31st of August, 1840, it was recited that the residue of the testator's estate, after providing for the purposes in the said decree mentioned, and for all other purposes directed by the testator's will, would greatly exceed the sum of 10 lacs, although the amount thereof could not be ascertained until such purposes were finally completed, in which event the whole thereof became applicable according to the provisions of the said will to the increase of the said establishments at *Calcutta*, *Lyons*, and *Lucknow*. And it being desirable that such increase should not be postponed until the final completion of the purposes aforesaid, but should take effect immediately, as far as practicable, it was ordered that 5 lacs should be carried to the account of the *Calcutta Martinière*, 5 lacs to the trustees of the *Lucknow* charity, and 5 lacs should be paid to the mayor and municipality of *Lyons*.

By an order dated the 28th of February, 1849, after directing certain payments by way of restoring to the residue certain sums which had been paid in excess for the benefit of the *Lucknow* charities aforesaid, the residue then available was divided in equal shares between the *Calcutta Martinière*, the *Lucknow* trustees, and the mayor and municipality of *Lyons*.

On the 3rd of August, 1865, the Advocate-General of Her Majesty for the Presidency of *Fort William* in *Bengal* preferred his Petition to the High Court, and after stating the said 28th Article and the schemes contained in the Master's report of the 11th of November, 1802, and the confirming order of like date, and stating the payments which had been made under orders of the Court to the funds set apart for the release and relief of prisoners at *Calcutta*, but not stating any of the subsequent decrees or orders hereinbefore mentioned, further stated that for many years past the said schemes for the distribution of the said annual sum of Rs.5000 for the release of prisoners, and of the said annual sum of Rs.1000 for the relief of prisoners, had both become obsolete, and that neither of them had been acted upon in practice, and that the funds in Court had largely accumulated owing to the small expenditure out of the income thereof, and stated the amounts of the said funds which were then in the aggregate upwards of Rs.350,000 in *India* 4 and 5 per cent. paper, and in cash, and that the number of persons coming or likely to come within the express terms of the bequests in the said 28th article of the will mentioned was and would be wholly insufficient to exhaust the income of the said funds in Court, and that it had become impracticable literally to carry into effect the said bequests, thereby prayed that he might be at liberty to lay before the Court a scheme or schemes for the application of the trust funds then in Court, or the income thereof, or a part thereof respectively, in lieu and supersession of the said former schemes which had become obsolete and were then incapable of being carried into effect.

By an *ex parte* order, dated the 3rd of August, 1865, and made upon the said Petition, liberty was given to the Advocate-General to propose and lay before the Court a scheme for the application of the said funds. A scheme was accordingly brought in and reported upon, and approved by Mr. Justice *Norman* on the 20th of February, 1866.

By an order of the said Court, dated the 2nd of March, 1866, the report containing the said scheme was confirmed, and it was ordered amongst other things as follows:—That the *corpus* of the funds in Court, beyond the sum which would at 4 per cent. produce yearly 6000 sicca rupees, should be applied in manner following (that is to say) one lac rupees be transferred to the credit of the governors of the *Calcutta* branch of *La Martinière*, and the residue (after deducting costs) to the credit of the trustee of the *Lucknow* branch of *La Martinière*.

That the sum which would as aforesaid produce yearly 6000 sicca rupees, viz., 150,000 sicca rupees, should be kept apart in one account, to be headed "The account of General *Martin's* fund for the release and relief of prisoners," and should be applied for the benefit of convicts on their release from jail as therein mentioned, the income to be paid out of Court half-yearly to the Commissioner of Police for the town of *Calcutta.*

The said order was obtained *ex parte* on a Petition of the Advocate-General filed on the day of the date thereof, and the Appellant had no notice either of the Petition of the Advocate-General or of the report of Mr. Justice *Norman,* or of the order of the 2nd of March, 1866.

On the 30th of June, 1873, the Appellant, the Mayor of *Lyons,* acting for and in the name of the community of the city of *Lyons,* presented his petition to the High Court of Judicature, and thereby, after stating the particulars relating to other funds which had, as the Petitioner contended, fallen into the residue of the testator's estate, and also stating the said order of the 2nd of March, 1866, which was, as the petition alleged, made without notice to the Petitioner; it was among other things prayed that it might be declared that the bequest in the 28th article of the testator's will had failed, and that the sums standing to the credit of the separate accounts, "General *Claude Martin's* Fund for the Release of Prisoners," and "General *Claude Martin's* Fund for the Relief of Prisoners," fell into and formed part of the residue of the testator's estate, and that it might be ordered that the said sum of 150,000 sicca rupees, with the accumulations, if any, might be transferred to the general credit of the causes, and that an account might be taken of the sums received by or set apart for the benefit of the residuary legatees, other than the Mayor of *Lyons,* under the said order of the 2nd of March, 1866; and that the amount might be recouped to the general credit of the causes, or duly brought into account in adjusting the division of the residuary estate; and that the amount of the residue divisible between the residuary legatees, and the share coming to each of them, might be ascertained, having regard to the sums properly payable or transferable to the general credit of the causes and to the adjustments aforesaid.

The petition of the Mayor of *Lyons* came on to be heard before the High Court of Judicature, and by the order made on the said petition on the 10th of September, 1873, it was among other things ordered that the prayer of the petition of the Mayor of *Lyons*, so far as it related to the bequest in article 28 of the will of the said testator, be refused, and it was declared that the charitable gift in the 28th article of the said will was an absolute charitable gift capable of being applied *cy-près*, and that the Mayor of *Lyons*, as one of the residuary legatees under the said will, was not entitled to any part of the trust funds appropriated to such gift.

Mr. *Cowie*, Q.C., and Mr. *Hemming*, Q.C., for the Appellant, referred to the various clauses of the will and history of the proceedings hereinbefore and in the report of the *Mayor of Lyons* v. *East India Company* (1) set forth. They contended that the effect of the will and of the whole series of orders made in the suits mentioned above, prior to the *ex parte* proceedings in the years 1865 and 1866, was that the Appellant, as representing the city of *Lyons*, was entitled to one-third of the sums set free by the failure of particular charitable bequests. Orders had been made for division of sums representing residue, and for payment of one-third to the Mayor and Municipality of *Lyons* from time to time as funds become available. In all the decrees and orders mentioned above, and in all consequent proceedings, the fund which had been set free by the failure of the bequest of Rs.4000 per annum for the liberation of prisoners at *Lucknow*, was treated as part of the residue divisible into thirds, of which one was payable to the Mayor and Municipality of *Lyons* for the charitable purposes mentioned in the will of the testator. They referred especially to the decrees of the 23rd of February, 1832, and the 31st of August, 1840. With regard to the orders made and the proceedings had in the years 1865 and 1866, they were not binding on the Appellant for want of notice.

The High Court in the judgment under appeal had in substance held that the funds ought to be applied *cy-près* in a particular manner, to the exclusion of the *Lyons'* charity, to which

(1) 1 Moore, Ind. Ap. Ca. p. 175, see especially pp. 292, 294.

J. C.
1875–6

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

one-third of the residue was given by the will; but such application of the doctrine of *cy-près* is erroneous. There was a complete residuary gift in favour of specified charitable objects; and such being the case, the particular legacy which failed lapsed into the residue. The *cy-près* doctrine cannot be applied in order to divert moneys given to a charity to purposes which were non-charitable, and if charity is the admitted purpose in view, it must be the charity specified by the testator himself according to his expressed intention in the residuary clause, and not one which the Court substitutes for it in accordance with some presumed intention. If the *cy-près* doctrine is applicable at all, the Mayor of *Lyons* is one of the proper objects of its application. It is conceded that there is a general dedication by the testator to a charity, and if a particular mode indicated by an early clause in the will fails, another still charitable is to be adopted, in accordance with the direction in a later one. In other words, when the residuary bequest is to charity, there was no reason for a *cy-près* disposition of a charitable legacy, and the rule failed together with the reason which supported it. They referred to *Jarman* on Wills [2nd ed.], vol. i., p. 199, and *Moggridge* v. *Thackwell* (1). In this particular case, moreover, the doctrine if applied would contravene the intention of the testator, which clearly pointed out the three *Martinière* establishments as the principal and prominent objects of his bounty. The true construction of the will was that on failure of those particular legacies of Rs.5000 and Rs.1000 annually, there was a bequest over of the *corpus* of the fund to the three *Martinière* establishments.

Lastly, if notwithstanding the words of the will, and the decrees and orders heretofore made, the Court below was right in regulating the application of this fund by the *cy-près* doctrine, the scheme which it has devised in consequence ought to be amended, in that it improperly excludes the Mayor of *Lyons* from all participation therein. The intention of the testator was to benefit all these *Martinière* institutions, and it was wrong to exclude the *Lyons* charity altogether whilst framing the scheme.

Mr. *Cotton*, Q.C., and Mr. *Macnaghten*, for the Respondents, con-

(1) 7 Ves. 36.

J. C.
1875-6

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

tended that the gift contained in article 28 of the testator's will was an absolute charitable gift capable of being applied *cy-près*, and therefore the bequest did not fall into the testator's residuary estate on failure of the particular object pointed out by the testator. The rule contended for on the other side, that the *cy-près* doctrine cannot be applied where the residuary bequest is to a charity, is unsupported by authority, and is also unreasonable. Cases might be supposed where the particular bequest which failed was in favour of an important and extensive charity, and the residuary bequest was to one of limited scope, to which the application of large sums would be absurd and clearly opposed to the testator's intention. The true rule is that a valid legacy to a charity cannot fail, and if the particular object fails, the disposition of the moneys so bequeathed will in all cases be regulated by the *cy-près* doctrine, notwithstanding that the residue is likewise given to charity. The legacy to the particular charity is sustained by ascertaining what is the particular object nearest in character to that which has failed; not by ascertaining from the rest of the will what are the other charitable objects which the testator, in other dispositions of his property, has had in view. [They referred to *Jarman* on Wills [2nd ed.], vol. i., p. 199; *Fisk* v. *Attorney-General* (1); *Re Ashton's Charity* (2); *Attorney-General* v. *Ironmongers' Company* (3).] A gift to a charity may be held to fail: see *Cherry* v. *Mott* (4), where such a gift was held totally void; but where charity in however general a sense is once established as the legatee, and the particular mode of executing it pointed out by the testator fails, it will be executed by the Court *cy-près*. See also *Mills* v. *Farmer* (5). In the case of a legacy to an individual, form is of the essence, and if he cannot take it *modo et formâ* he cannot take it at all; in the case of a legacy to charity it never fails when once the gift has been established, for the Court will reform the mode of execution in order to give effect to the intention.

It is argued on the other side, that it was the intention of the testator that if the particular object of charity indicated in the

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(1) Law Rep. 4 Eq. 521.
(2) 27 Beav. 115. 5 Jur. N.S. 665.
(3) Cr. & P. 208; 2 My. & K. 576; 10 Cl. & F. 908.
(4) 1 My. & Cr. 133.
(5) 19 Ves. 483; 1 Mer. 99.

J. C.
1875 6

MAYOR OF LYONS *v.* ADVOCATE-GENERAL OF BENGAL.

28th clause failed, then that there was a bequest over to the charities mentioned in the residuary clause. Such bequest over nowhere appears in express terms, and to give effect to it is to construe a testator's will, not by the terms which he has employed, but by conjectures of what he might have intended in a state of circumstances different from those which he contemplated at the date of his will. Instead of executing the intention of the testator in the manner which is nearest to that which he has expressed, it is to be assumed that the legacy is to be diverted to another and it may be totally different purpose from that which he has expressed. In this case the charities mentioned in the residuary clause are totally different from that indicated in the 28th. [They referred to *Ex parte Governors of Christ's Hospital* (1); *Chamberlayne* v. *Brockett* (2).] There being nothing in this will to exclude the application of the doctrine of *cy-près* the Court below has, in the scheme referred to by the other side, exercised its discretion as to the manner in which that doctrine should be applied; and a Court of Appeal will not interfere with the exercise of discretion by the lower Court, where it is a mere question of discretion. See judgments of Lord *Cottenham* and Lord *Campbell: Ironmongers' Company* v. *Attorney-General* (3). Moreover, upon the question of the exercise of discretion, assuming the doctrine of *cy-près* applies, the Appellant is not entitled to be heard. He was not a party to the proceeding in which the discretion was exercised, or to the suit in which this particular legacy is being administered. His share had been carried to a separate account, and separated from the cause entirely. The Appellant and the next of kin had agreed to divide between them anything which came to them by way of residue, and that compromise had been sanctioned by the proper French authority. See *Mayor of Lyons* v. *East India Company* (4). With regard to the right of the Appellant under the antecedent orders and decrees referred to by his counsel, the question of the failure of this particular legacy had not at those dates arisen; and no declaration has been made either expressly or impliedly in reference thereto. The decree of 1832 construed

(1) Law Rep. 8 Ch. 199.

(2) Ibid. 206.

(3) 10 Cl. & F. 926, 929.

(4) 1 Moore, Ind. Ap. Ca. 219.

the will with regard to the disposition of the surplus after the legacies in question had taken effect, and did not contemplate their failure; and the decree of 1840 dealt with part of the surplus on the same footing.

J. C.
1875-6

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

Mr. *Hemming*, Q.C., replied.

The judgment of their Lordships was delivered by

1876
Feb. 5.

SIR MONTAGUE E. SMITH:—

The questions in this appeal arise upon one of the bequests in the will of Major-General *Claude Martin*, whereby he gave the annual sums of Rs.5000 and Rs.1000 to be applied respectively to the discharge and relief of poor debtors detained in prison in *Calcutta*. The residue of his large property the testator bequeathed, in the special manner more particularly stated hereafter, to increase the funds of certain charitable establishments which, by previous clauses in his will, he had founded in *Calcutta*, *Lucknow*, and the city of *Lyons*, in *France*.

The bequests to poor prisoners in *Calcutta* having failed by reason of the abolition of imprisonment for debt, the point to be considered is, whether these gifts are to be dealt with by the Court upon the principle of a *cy-près* application of them, or whether, as the Appellants contend, they fall into the residue, so as to increase the endowments of the three establishments above referred to.

The testator was a Frenchman, born in *Lyons*. He entered the military service of the *East India Company*, and attained the rank of Major-general. With the sanction of the British Government he afterwards took service under the Ruler of *Oude*, and resided at *Lucknow*, where he died in 1801.

The will, dated the 1st of January, 1801, was composed and written by the testator himself in English, a language of which, it appears, he had only an imperfect knowledge. It contains numerous bequests, comprised in thirty-four articles or clauses, and has been the subject of many suits and much litigation. Several questions arising upon it, and notably the question whether the English law relating to aliens had been introduced

J. C.
1876
MAYOR OF LYONS v. ADVOCATE GENERAL OF BENGAL.

into British *India*, were determined by this Committee on appeal in 1836. The judgment was delivered by Lord *Brougham*, and some passages of it will hereafter be referred to. The general history of the suits will be found in Mr. *Moore's* full report of the case. See the *Mayor of Lyons* v. *East India Company* (1).

By the will in question the testator bequeathed his property, which he valued at upwards of thirty lacs of rupees, partly to individual legatees, and more largely to various charitable objects. The most prominent of the charities were the institutions he founded in *Lucknow, Calcutta,* and *Lyons* for educational and other purposes, his desire being to perpetuate his memory in these cities. The purposes are not precisely alike in the three cities, owing to the different conditions of the countries to which they belong. The bequest to *Calcutta* is found in the 24th article of the will; that to the city of *Lyons* is contained in the 25th article, and is as follows:—[The judgment then set out the article, see *ante,* p. 94.]

It is to be observed that this 25th article contains the gift of an annual sum of Rs.4000 to be paid to the magistrates of *Lyons* to liberate poor prisoners detained for debt.

The analogous gift in favour of poor prisoners in *Calcutta,* which forms the subject of the present appeal, is not in like manner included in article 24, containing the principal bequest to that city, but is found in a separate article (the 28th), which is as follows:—[The judgment then set out the article, see *ante,* p. 95].

The material part of the 33rd article, which contains what may be treated as a residuary disposition, is in the following terms:—

"After all accounts being settled, and sum insured for the interest for the payment of the several monthly pension, and the several payment of gift and others, as also the several establishment, if a surplus above £100,000 sterling, or about 10 lacs of sicca rupees, remain of my estate, that above surplus of 10 lacs of sicca rupees is to be divided in such a manner as to increase the several establishment of *Calcutta,* at *Lyon,* and *Lucknow,* as that they may be permanent and exist for ever. Besides the sum allowed for finishing all the building, and other of *Constantia*

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(1) 1 Moore, Ind. Ap. Ca. 175; S. C. 1 Moore, P. C, 175.

House, which I suppose may amount to 200,000 sicca rupees, I also give and bequeath the sum of 100,000 sicca rupees for the support of the college and other school, to be regulated as the *Calcutta* establishment, as per articles 24, as also as the establishment at *Lyon*, articles 25, the gift for the poor of *Lucknow*, to be conducted as mentioned in articles 23. I also give and bequeath the sum of 4000 sicca rupees to be paid annually for to liberate as many prisoners for debt at *Lucknow* as it may extend, and if none, then that sum is to remain to the estate; any sum remaining is to be placed at interest for to accumulate, and improve the several establishment and concern of indigo."

This article, it may here be remarked, comprises a gift of 4000 rupees to be paid annually to liberate poor prisoners for debt at *Lucknow*, but with a direction, that "if none, that sum is to remain to the estate."

Without going into the details of the suits, it will be convenient to refer generally to the proceedings relating to the fund now in dispute.

It appears that by an order of the Supreme Court of Judicature at *Fort William* of the 11th of November, 1802, made in the cause of *Uvedale* v. *Palmer*, a scheme which had been settled by the Master for the administration of the charities for the release and relief of poor prisoners at *Calcutta* was confirmed by the Court, and funds to satisfy these charities were, by orders of the Court, transferred to the credit of two accounts entitled respectively, "Distribution of General *Claude Martin's* Fund for the Release of Prisoners," and "Distribution of General *Claude Martin's* Fund for the Relief of Prisoners."

The above orders are not found in the record, but their existence was admitted by the counsel, and the substance of them is stated in the petition of the Officiating Advocate-General of the 3rd of August, 1865, and in a previous decree of the 31st of August, 1840. It also appears that the income of these funds, in excess of what was required for poor prisoners, had accumulated, and at the date of the petition of the Advocate-General above referred to, the fund amounted in the aggregate to about Rs.351,000.

This petition, after stating that for many years past, owing to the passing of laws for the relief of insolvent debtors and other causes, the existing scheme "had become obsolete," submits that there were useful charitable objects of a kind not very different from those contemplated by the testator, and also charitable objects of other descriptions which the testator approved and made the subjects of other bequests, towards which the income of the funds might now be beneficially applied; and prays to be at liberty to submit a scheme for the application of the funds "in lieu and supersession of the former schemes."

On the 3rd of August, 1865, an order was made on this petition as prayed. This was done without citing the Mayor of *Lyons;* and in making it the Court evidently assumed it had power to deal with these funds on what is called the *cy-près* principle.

A scheme was accordingly settled and confirmed by an order of the Court on the 2nd of March, 1866.

This scheme provides, in substance, that a sum of Rs.150,000, representing an annual income of Rs.6000, should be reserved in an account to be headed, "The account of General *Martin's* Fund for the Release and Relief of Prisoners"; the income of which was to be applied by the visiting justices to assist convicts who had conducted themselves properly in prison upon their discharge; and that the corpus of the fund, after reserving the above sum of Rs.150,000, should be applied as follows, viz.: "that one lac of rupees should be transferred to the credit of the governors of the *Calcutta* branch of *La Martinière,* and the residue (amounting to nearly a lac of rupees), after paying the costs of these proceedings, should be transferred to the credit of the *Lucknow* branch of *La Martinière* for the general purposes of these institutions respectively." Some special directions also were given regarding the disposition of the fund transferred to *Lucknow.*

It will be convenient to mention here what has been done with respect to the charities for the liberation of poor prisoners in *Lyons* and *Lucknow.* With respect to *Lyons,* it was declared by the decree of the 23rd of February, 1832 (and this declaration was not disturbed on the appeal in 1836), "that a sum sufficient to satisfy the bequest of Rs.4000 to be paid annually for the liberation of prisoners at *Lyons,* together with the accumulation of interest since testator's death, had been fully paid to the mayor and commonalty of *Lyons*." It appears therefore that this fund, instead of being carried to an account in the causes, as was done with the *Calcutta* fund, was, before the year 1832, paid over "fully" to the municipality of *Lyons*, and that the administration of it has since taken place without any control by the Court.

With respect to *Lucknow*, the decree of the 23rd of February, 1832, declared that it being impossible owing to the form of government at *Lucknow* and other causes to give effect to the gift in favour of poor prisoners at that place, the bequest was void. This declaration relating to the gift to poor prisoners of *Lucknow* was not disturbed on appeal, and the residue was increased by the amount which would have been required to satisfy it. No objection appears to have been made to the *Lucknow* gift going into the residue; but it is to be remembered that in the clause of the will relating to this legacy it is expressly directed that in case of failure "the sum is to remain to the estate."

The order of the 2nd of March, 1866, confirming the scheme for the application of the funds in dispute, appears to have been unquestioned until 1873, when the petition of the Mayor of *Lyons*, which gives occasion to the present appeal, was filed. That petition (dated the 21st of June, 1873), after stating the facts, and asking relief with respect to other sums which was granted in the Court below, prayed that it might be declared that the bequests in the 28th article of the testator's will had failed, and that the sum standing to the credit of the accounts for the relief and release of prisoners at the date of the order of the 2nd of March, 1866, fell into and formed part of the residue of the testator's estate. It also prayed for relief consequent on this declaration, to the effect that this amount with the accumulations should be ascertained and carried to the general credit of the causes, and divided between the petitioner and the other residuary legatees.

The Judges of the High Court in a judgment fully stating their reasons, whilst granting relief to the petitioner on other matters, refused this prayer; and inserted in their formal decree a declaration containing the ground of their refusal in these terms:—"That the charitable gift in the 28th clause of the will was an absolute charitable gift, capable of being applied *cy-près*; and that the petitioner, the Mayor of *Lyons*, as one of the residuary legatees under the will, is not entitled to any of the funds appropriated to that gift."

It is to be noticed that the only question raised by the petition is, whether the Appellant, representing the city of *Lyons*, is entitled as one of the residuary legatees to a share of these trust funds, as having fallen into the residue. Whether the *Martinière* establishment of *Lyons* should have been included in the distribution provided by the scheme ordered by the Court is a different question, which is not raised by the petition.

Three points were made at the Bar by the Appellant's counsel.

1. That the doctrine of *cy-près* disposition of charitable legacies is inapplicable where the residuary bequest is to charity.

2. That if this be not true as a general proposition, the doctrine is inapplicable to the particular case, by reason of the special provisions of General *Martin's* will.

3. That the previous decrees have determined the question in the Appellant's favour.

I. The Appellant's Counsel did not dispute the general doctrine, and there is no doubt that although strongly disapproved of by Lord *Eldon*, it was in his time so firmly established, that this great Judge felt himself bound, contrary to his own opinion, to give effect to it. But their broad contention was that there was no room or necessity for the interposition of the Court where the residuary bequest is to charity, and they sought in the reason of the rule the grounds for supporting this distinction. The rule, they said, was founded on the presumption that although the gift might be to a particular charity, the intention was to give to charity generally, and the Court therefore, when the particular disposition could not be carried into effect, undertook to make a *cy-près* application of the fund in order that charity should not be disappointed. The reason of the presumption, it was said, being to prevent funds given to charity from falling to residuary legatees or next of kin, and so disappointing the general intention of charity, altogether failed, and left no foundation for the interposition of the Court where the bequest of the residue itself was to charity. Why, it was asked, should the Court interfere to intercept a fund falling into a residue devoted to charity, substituting its own discretion for the testator's?

J. C.
1876
MAYOR OF LYONS v. ADVOCATE-GENERAL OF BENGAL.

The question thus raised does not seem to have been distinctly before the Courts in any of the previous decisions; but their Lordships, after fully considering the argument, are unable to perceive satisfactory grounds for such a limitation of the *cy-près* doctrine: certainly not as a limitation applicable generally to all cases in which the residuary bequest is to charity, whatever its kind and nature may be. The principle on which the doctrine rests appears to be, that the Court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the Court the gift notwithstanding the particular disposition may not be capable of execution subsists as a legacy which never fails and cannot lapse.

This seems to be what Lord *Eldon* understood to be the effect of the decisions, from the following passage of his judgment in *Mills* v. *Farmer* (1).

"With regard to charity, therefore, without going through all the cases, which I examined with great diligence in *Moggridge* v. *Thackwell* (2), a case that, bound by precedent, I decided as much against my inclination as any act of my judicial life, I consider it now established, that although the mode in which a legacy is to take effect is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote that charity is the legatee, the Court does not hold that the mode is of the substance of the legacy, but will effectuate the gift to charity, as the substance; providing a mode for *that legatee* to take which is not provided for any other legatee." This passage is reported in somewhat different language, but substantially to the same effect, in 1 Mer. 99.

Nor can the suggested distinction, as a general qualification of the doctrine, be, in reason, maintained. Cases may be easily supposed where the charitable object of the residuary clause is so limited in its scope, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it. If a large sum were given to endow a college, and the residue bequeathed for the support of three poor almswomen, or to provide coals at Christmas for ten poor persons, it would be manifestly absurd, supposing the *cy-près* doctrine be established at all, to withhold the application of it in instances of this kind. It cannot, therefore, in their Lordships' opinion, be laid down as a general principle that the *cy-près* doctrine is invariably displaced where the residuary bequest is to charity.

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(1) 19 Ves. 486.

(2) 7 Ves. 36.

II. But it was next contended that, however this may be, the Court below was wrong in applying the *cy-près* doctrine to the will in question. Undoubtedly the charitable establishments mentioned in the residuary bequest are of a comprehensive character, as well as prominent objects of the testator's bounty; and the argument of the Appellant's Counsel on this part of the case was strongly urged and has been carefully considered by their Lordships. The argument on this point really raises two distinct questions: (*a*), whether the *cy-près* doctrine is excluded; and (*b*), whether upon the construction of the will there was a bequest over of the legacy, in case of failure of objects, to the *Martinière* charities.

On the first (in the discussion of which it must, of course, be assumed there was no bequest over, otherwise *cadit quæstio*) the argument was founded on the presumed intention of the testator to make the *Martinière* establishments the principal objects of his bounty, and to give them the benefit of all lapsed funds. There is certainly much to favour this presumption; but if it be granted for the sake of the argument that, looking at the whole will, it is probable the testator, supposing he had thought about it at all, would have wished the bequest in question to have gone to increase the funds of these establishments, can this conjecture of intention and upon the hypothesis that the will does not contain expressly or by implication a bequest over, it can be no more—exclude the operation of the doctrine? It seems to their Lordships that an answer in the negative is found in the explanation of the doctrine already given, and that on this point the contention of the counsel for the Respondent is supported both by principle and precedent. It was in effect that the Court, when deciding whether the *cy-près* doctrine applies, looks only to the particular gift, and if it finds charity to be the legatee, sustains the legacy as such, without regarding at this stage of the inquiry (whatever may be proper when a scheme comes to be framed) the rest of the will.

This view of the doctrine appears to have been present to the minds of the learned Lords who took part in the decision of the *Ironmongers' Company* v. *Attorney-General* (1), although the discussion in the House of Lords turned wholly on the propriety of the scheme for the distribution of the trust funds; it never having been doubted apparently that the doctrine itself was applicable. In the will in that case the testator had divided the residue of his property between three charities, and the question arose upon a scheme for the appropriation of one of them, viz., the gift for redeeming British slaves in *Barbary*, which had failed for want of objects. It was held that in applying the *cy-près* doctrine the Court was to look primarily to the object of the charity which has failed, and was not bound to apply the funds which were set free in that case to the two other charities mentioned in the residuary clause of the will. The counsel, in arguing, is reported to have said: "The proper application of the doctrine of *cy-près* is, that you are to look to the objects of the testator, and to what comes near to those objects." To which Lord *Cottenham* replied: "No, *cy-près* means as near as possible to the object which has failed." Although this opinion was expressed with reference to a scheme for the distribution of the fund, it is clearly to be inferred that this would have been the consideration by which Lord *Cottenham* would have been guided in a case where he had to decide whether the doctrine applied at all. And upon fully considering the operation as well as the principle of the rule, it is difficult to see that it could be otherwise. Their Lordships, therefore, are brought to the conclusion that the jurisdiction of the Court to act on the *cy-près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.

The question remains whether such an implication arises upon this will. It certainly cannot be inferred from the terms in which the respective gifts to poor prisoners in *Calcutta* and *Lyons* are bequeathed, that the testator had contemplated the failure of either of these charities, or had formed any intention in that case regarding them; on the contrary, the inference arises, upon comparing these clauses with the corresponding gift for the benefit of the prisoners at *Lucknow* in which there is a direction that in the event of failure it shall remain to the estate, that he had not. If, then, such an implication can be made, it must be from the residuary clause itself, construed with the other parts of the will relating to the *Martinière* establishments. The frame of this clause is peculiar: "after the several payment of gift and others, as also the several establishment—if a surplus above 10 lacs remain, that above surplus is to be divided in such a manner as to increase the three establishments." Assuming this to be a residuary disposition into which, in case of failure, legacies other than to charity would fall, yet, in considering the present question, the peculiar frame and language of it cannot be disregarded, and from these it may be inferred that what was present to the testator's mind, and what alone he intended to dispose of, was a residue after the funds for these charities had been provided and set apart. It seems, therefore, to their Lordships, that there is not such a necessary inference of intention to be found in the terms and provisions of the will as is required to raise the implication of a bequest over by the testator of these legacies, upon the failure of the particular charities.

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(1) 10 Cl. & F. 908.

III. The third point argued at the Bar was that the decrees already passed are judgments in his favour on the questions above discussed. What the counsel mainly relied on was a general declaration as to the surplus funds contained in the decree of the 23rd of February, 1832, which was left undisturbed on appeal, and a disposition by a later decree of the 31st of August, 1840, of part of such surplus funds among the three *Martinière* establishments.

It is to be observed that the judgment of the High Court does not notice this point, nor does it appear to have been insisted on below. But however this may have been, their Lordships cannot find anything in the decrees referred to which decides the question. The declaration in the decree of 1832 was to the effect that after setting aside sufficient funds for the various charitable and other purposes of the will, the surplus, if amounting to 10 lacs, should be at once divided between the three establishments, and if it fell short of 10 lacs, should accumulate until it amounted to that sum, and be then divided. This is no more than an exposition of the will with regard to the surplus, after provision had been made for

J. C.
1876

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

the particular gifts. The Court did not then contemplate the failure of the gift in question, and could not have intended to make any declaration regarding it. The disposition referred to in the later decree of 1840 was only a distribution of part of the surplus on the footing of the declaration in the decree of 1832.

Reliance was placed by the Appellant's counsel on some observations in the judgment of this tribunal, delivered by Lord *Brougham*, in the former appeal. A question had arisen whether the gift to found the establishment at *Lucknow* could, in the circumstances of the country, be carried into effect. The decree below, founded on reports of the master, declared the inability of the Court to give effect to that bequest, but the Court, considering that the Governor-General had the means of doing so, had ordered the funds to be paid to the Government for that purpose. This tribunal held that this part of the decree was not warranted by the master's reports, and directed a further reference upon the facts. In stating the questions which arose, Lord *Brougham* made the observations relied on: "Can the decree as to the application of the fund stand?—Shall the fund be applied to the establishment and support of a college at *Lucknow?*—Shall it sink into the residue and be divided between the two charities appointed to be established at *Calcutta* and at *Lyons?*—for the cases of *Attorney-General* v. *Bishop of Llandaff* (1), and *Attorney-General* v. *Ironmongers' Company* (2), make it clear that in this case, which is indeed stronger than either of those, the other two charities must take, if the gift fails as regards the third." It is obvious that the question of the ultimate disposition of the fund was not ripe for decision, the point then under consideration being the directions proper to be given for carrying into effect, if possible, the *Lucknow* Charity; and, indeed, the decree advised by this Committee, giving directions for that object, was expressly made "without prejudice to any question as to the final application of the same fund under the directions hereinafter contained or otherwise." The observations in the judgment, therefore, can only be regarded as an opinion, and not as a judgment. So regarded, however, they would have been entitled to great weight, if their authority had

(1) Cited 2 My. & K. 586.

(2) Cr. & P. 208; 2 My. & K. 576; 10 Cl. & F. 908.

J. C.
1876

MAYOR OF LYONS
v.
ADVOCATE-GENERAL OF BENGAL.

remained unimpeached. But the subsequent decision in the case of the *Attorney-General* v. *Ironmongers' Company* in the House of Lords, in which Lord *Brougham* concurred, corrected the views his Lordship had expressed in an earlier stage of that case (1), and in the observations referred to. That decision was in effect that among charities there was nothing analogous to benefit of survivorship.

It was lastly submitted by the Appellant's counsel, that if a *cy-près* application was admissible, the actual scheme which excluded the *Lyons* Charity from participation in the fund is an improper one. The High Court held, and, as their Lordships think, rightly, that it was not competent for the Appellant, under his present petition, which is confined to the claim of a share of the residue, as residuary legatee, to open the scheme. But with a view to prevent further litigation and expense, the Judges expressed an opinion that if it was proper to reform the scheme at all, it might be right to confine it to charitable objects in the city of *Calcutta*, excluding both *Lucknow* and *Lyons*. Their Lordships have been invited to correct this view, and to declare that the *Lyons* Charity ought not to be excluded.

Agreeing with what was said in the House of Lords, in the case of the *Ironmongers' Company*, as to the care and circumspection to be exercised by a Court of Appeal in substituting its discretion for that of the Court below, their Lordships would be reluctant in any case to interfere with a scheme unless it were plainly wrong, and still more to unsettle, by a premature declaration, one which is not regularly before them. Besides, bearing in mind the opinions expressed in the House of Lords, so often referred to, they are not satisfied, as at present advised, that the view of the High Court does not accord with them. The sum of these opinions appears to be, that whilst regard may be had to the other objects of the testator's bounty in constructing a scheme, primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. If this be the rule, may not the gift to poor prisoners in *Calcutta* be considered to have a local character; and in that case, may not a scheme properly framed for the benefit of other poor persons in *Calcutta* be supported, as being *cy-près* to

(1) See 2 My. & K. 586.

the original purpose. And if these questions are capable of being answered in the affirmative, it follows that it would not be a valid objection to the present scheme that it gives no part of the funds to *Lyons*. The contention upon this point, then, appears to come to this, that the inclination of the testator to benefit the *Martinière* institutions so strongly appears, that it ought to guide the Court in framing a scheme, in preference to the principle of selecting an object near to that which has failed. Opinions may well differ on such a point. Reasons are not wanting in favour of the Appellant's contention; but, on the other hand, much may be said in favour of the view that these gifts to poor prisoners bear the character of a charity for the relief of misery in the particular locality. The necessary funds for them were directed by the will to be set apart, and in the case of the *Lyons* Charity were, long ago, paid over to the municipal authorities of that city. It may well be doubted whether if such a contingency as the failure of the gift to *Lyons* should occur, it would be thought proper that any part of the funds paid over to the authorities there should be restored to *India.*

Their Lordships are not now called upon to decide whether the application of the gift which has failed to the relief of criminal prisoners, and the transfer of part of it to *Lucknow*, are proper, or the best possible disposition of the fund. All they need say about the actual scheme is, that they do not feel justified upon the present appeal in declaring, as they are invited to do, that it is necessarily bad, because no part of the fund has been appropriated to the *Lyons* Charity.

In the result, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Young, Jackson, & Co.*
Solicitors for the Respondent: *Lawford & Waterhouse.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
Feb. 17.

ALEXANDER THORN . . . . { PLAINTIFF IN ERROR;

AND

THE MAYOR AND COMMONALTY OF LONDON . . . . { DEFENDANTS IN ERROR.

Contract—Implied Warranty.

Where plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification.

The contractor for the work cannot, therefore, sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans and specification.

T. contracted with the Defendants to take down an old bridge and build a new one. Plans and a specification prepared by the Defendants' engineer were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labour and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labour occasioned by the failure of the caissons, and in his declaration alleged that the Defendants had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract:—

Held, that none could be implied.

Semble, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit.*

ON the 5th of March, 1864, Mr. *Brand*, on behalf of the Bridge House Committee of the City of *London*, published a notice asking for "tenders for taking down and removing the present bridge at *Blackfriars*, and erecting a new bridge in lieu thereof." The "plans of the intended new bridge and specification of the works to be executed," were announced as to be seen at the office of Mr. *Joseph Cubitt*, the engineer, who was employed by the Defendants. The Plaintiff and his brother, Mr. *Peter Thorn* (since deceased), tendered for the work, and their tender was accepted.

Article 30 of the specification declared that the contractors were "to take out their own quantities, no surveyor being authorized to act on the part of the corporation;" Article 36 was thus worded: "Drawings lettered A, &c., are plans and sections of the existing bridge, and of the works executed thereon. They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor will not be entitled to charge any extra should the work to be removed prove more than indicated on these drawings." Under the head of "coffer-dams," there was in the specification this article: "54. The contractor must satisfy himself as to the nature of the ground through which the foundations have to be carried; all the information given on this subject is believed to be correct, but is not guaranteed." Under the heading "Iron caissons," the specification contained the following articles: "63. The foundations of the piers will be put in by means of wrought iron caissons, as shewn on drawing No. 7." "64. The casing of the lower part of which caissons will be left permanently in the work. The upper part, which is formed of buckle plates, is to be removed. The whole of the interior girder framing must be removed as the building proceeds, the work being made good close up to the underside of each girder before removal thereof." "66. The whole of the iron used in the caissons shall be of good quality capable of bearing a tensible strain of 18 tons per square inch. Plates and bars will be selected at random by the engineer, which must be cut to the required form, and submitted to such tests as the engineer may direct." The 77th article declared that "all risk and responsibility involved in the sinking of these caissons will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that may arise in the execution of the works." The 79th article put the control of the quality of the concrete under the direction of the engineer.

Upon the Plaintiff's tender being accepted, a deed dated the

H. L. (E.)
1876
THORN
v.
MAYOR AND
COMMONALTY
OF LONDON.

24th of May, 1864, was executed. This deed in various parts described the intended works as to be executed to the satisfaction of the engineer. The works (sect. 8) were to be completed, within three years, for the sum (sect. 12) of £269,045, increased by such sum as shall become payable, or, as the case may require, diminished by such sum as shall have to be deducted, (as provided in sect. 13) in respect of alterations or variations in the works." Sect. 13 gave the engineer power "at any time or times, during the progress of the works to vary the dimensions or position of the various parts of the works to be executed under these presents, without the said contractors being entitled to any extra charge for such alteration, provided the total quantity of work be not increased or diminished thereby." Any alteration should be valued according to the schedule of prices accompanying the deed. And whenever the engineer gave notice of any such alteration or variation the contractors were to execute the work according to his directions. For delays caused by the contractors £1000 a month were to be deducted from the contract sum. By sect. 22 it was provided that in case the contractors should refuse or neglect to perform the works "as in the aforesaid specification directed or mentioned, or as shewn on any of the said drawings, or to obey and comply with any order or direction to be given by the engineer," the works might be taken out of the hands of the contractors.

The work was begun in June, 1864, and neither the Bridge House Committee nor the Mayor and Commonalty ever, in any way, interfered with its progress. But after the caissons prepared as directed had been used, it was found that they would not answer their purpose, and the plan of the work was altered. Time was thus lost, and the labour which had been given to the execution of the original plans was wasted. It was admitted that the work done under the contract had been well done, and the contract price was duly paid, and the costs of the extra work rendered necessary by alterations had been paid. But the contractor claimed compensation for loss of time and labour occasioned by the attempt to execute the original plans. This was refused, and this action was brought. In the declaration it was alleged that "the Defendants guaranteed and warranted to the Plaintiff that *Blackfriars Bridge* could be built according to certain plans and a specifica-

Pa [illegible]

tion then shewn by the Defendants to the Plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shewn on the said plans would resist the pressure of water during the construction of the said bridge, whereby the Plaintiff was induced to contract with the Defendants for a certain sum of money, far less than he otherwise would have done;" and then the declaration went on to allege the failure of the plans and specification and of the caissons, whereby he was obliged to expend large sums of money in endeavouring to build the bridge according to such plans, and in afterwards completing the bridge; and he lost all the profits he otherwise would have realized in building the same.

The cause of the failure was that the caissons would not resist the external pressure of the water, so that the piers of the bridge had to be built independently of them, and much of the preceding work was wasted, and the piers were built as the tide permitted the work to go on, which occasioned great delay.

The facts were turned into a special case for the opinion of the Court of Exchequer. The case was argued in May, 1874, and the Lord Chief Baron, Mr. Baron *Pigott,* and Mr. Baron *Amphlett,* gave judgment for the Defendants on the ground that there was no implied warranty in the contract (1). On Error, this judgment was affirmed in the Exchequer Chamber (2). Error was then brought to this House.

Mr. *Benjamin,* Q.C., and Mr. *H. M. Bompas* (Mr. *Littler,* Q.C., and Mr. *J. W. Batten,* were with them), for the Plaintiff in Error:—

If a man enters into a contract by which he binds another to do certain work for him at a certain place, he impliedly undertakes that the place shall be free and fit for the work to be done there. So, if he stipulates that the work shall be done in a certain manner, he undertakes that it can be done in that manner. And this is especially so if he appoints his own servant to see that it is done in that manner, and, by his contract for the work, binds the workman to follow the directions of that servant. All this occurred

(1) Law Rep. 9 Ex. 163.

(2) Law Rep. 10 Ex. 112.

in the present case. The plans and specification were prepared by the engineer of the Defendants. The Plaintiff was required to work according to those plans and specification, and was put under the direction of the engineer; he acted under that direction; he did the work according to the plans and specification. It was admitted that he did the work well, but it failed, and had to be altered because the plans and specification were erroneous. Nothing could be more in accordance with justice than that the workman whose time and labour had been thus wasted, and wasted not by his own fault but by the mistakes of the person whose directions he was bound to obey, should be compensated for the loss he had thereby suffered. He was to be punished by a heavy penalty for any delay occasioned by himself; he was equally entitled to be compensated if delay was occasioned by the act or default of others. This principle of implied liability arising from the nature of the circumstances was adopted in *Knight* v. *Gravesend, &c., Waterworks Company* (1); and that case ought to be followed here. The specification formed part of the contract, for one of the recitals of the contract, after mentioning its preparation by *Cubitt*, said, "It includes the general conditions of and in relation to the works." And the various clauses in the contract which submitted the acts of the contractor to the direction of the engineer, all shewed that the contractor was not like a mere independent workman who had undertaken to perform a certain work, and was responsible for the manner of doing it, and was left to perform it in his own way, but was like a person bound to do the work in a certain form, and in no other, and to do it in that form under the directions of a particular officer. If that form led to failure, he ought not to suffer for the failure. The responsibility lay with those whose fault occasioned it. The only instance in which the contractor was required to use his own knowledge and discretion was to be found in the 54th article of the specification, but the fact that he was there required to satisfy himself as to the nature of the ground through which the foundations were to be carried shewed that, as to all other matters, the Defendants took on themselves the responsibility of the business.

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(1) 2 H. & N. 6.

H. L. (E.)
1876
THORN
v.
MAYOR AND
COMMONALTY
OF LONDON.

Now the failure here had not been occasioned in any way through neglect as to that article, but arose entirely from the mistake of the engineer as to the strength and use of the caissons. *Roberts* v. *Bury Improvement Commissioners* (1) was in favour of the Appellant. It had at first been decided the other way, but that was because it had been deemed there that the words of the contract gave final authority to the architect to decide on the matter, and such had been the opinion of the two dissenting Judges in the Exchequer Chamber (2). The majority of that Court however overruled the first decision, on the ground that the rule of law which exonerates one of two contracting parties from the performance of a contract, applied where the performance of it is prevented or rendered impossible by the act of the other party. And nobody doubted that, but for the matter of the supposed finality of the architect's determination, the Commissioners would from the first have been liable, for the fault had arisen not from the act of the contractor, but from that of the Commissioners. Here the fault was altogether that of the Defendants' engineer; and the Plaintiff must not suffer on that account. *Hill* v. *Corporation of London* (3) was a case where the contractor was held entitled because the land on which he was to build had not been given to him, and his performance of his contract was therefore rendered impossible. So here, the caissons were not merely unfit for the work, but were the occasion of mischief, and the work which had been performed was wholly wasted. But that was the fault of the engineer, not of the Plaintiff; and for the fault of their engineer the Defendants were responsible. *Appleby* v. *Myers* (4) was not adverse to the Plaintiff, for there the contract itself had made the price payable only on the completion of the work, and as the work had not been completed, no part of the price could be demanded. Here there was no such restraining stipulation. The work had been done, and well done. It had been done under the direction of the engineer, and what was defective was entirely occasioned by his plans, which the Plaintiff was bound to follow. For the loss which had been occasioned by following them, the Plaintiff was entitled to be compensated.

(1) Law Rep. 4 C. P. 755.

(2) Law Rep. 5 C. P. 310.

(3) Not reported.

(4) Law Rep. 1 C. P. 615; 2 C. P. 651.

12 Jur N.S. 500

H. L. (E.)
1876
THORN
v.
MAYOR AND
COMMONALTY
OF LONDON.

Sir *H. Giffard*, S.G., and Mr. *Thesiger*, Q.C., for the Defendants, were not called upon.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, nothing could be more ingenious and able than the two arguments which your Lordships have heard from Mr. *Benjamin* and Mr. *Bompas* in support of the case of the Appellant. But, my Lords, those arguments, ingenious and able as they were, have certainly not occasioned any doubt in my mind, and I think they have not occasioned any doubt in the mind of any of your Lordships, as to the soundness of the decision, the unanimous decision, of the two Courts from which this appeal has been brought.

My Lords, the action which was brought by the Appellant in this case was upon a cause stated in his declaration, very shortly in these words:—[His Lordship read the declaration, see *ante*, p. 122.]

The action so commenced was, by an order of the learned Judge, ordered to be turned into a special case without pleadings, and we must go to the special case to find what is the question put, and what is the ground of action submitted for decision to the Court. "The question" on the special case "for the opinion of the Court is, whether there is any and (if any) what implied warranty on the part of the Defendants, to the effect stated in the declaration, or so as to give to the Plaintiff a cause of action against the Defendants. If the Court should be of opinion that such warranty exists, and that on the facts the Plaintiff has a cause of action, then judgment is to be entered for the Plaintiff." "If the Court should be of a contrary opinion, then judgment to be entered for the Defendants." Therefore, my Lords, the action, whether you look to the declaration or to the special case, is an action founded upon a warranty; and the question for the opinion of the Court is, whether such a warranty exists, either by expression or by implication.

I do not propose to go at any length into the narrative of the facts of this case which has been so completely and so recently put before you. *Blackfriars Bridge* was to be rebuilt. The Defendants, who constitute the Corporation of *London*, called for tenders for rebuilding the bridge. They had, of course, to indicate in what way they desired the work to be constructed, and, as is usual in such cases, specifications and drawings were prepared by their

H. L. (E.)
1876
Thorn
v.
Mayor and
Commonalty
of London.

engineer, Mr. *Cubitt*, to be the subject of tender. Mr. *Cubitt* considered that the bridge could be built in a manner which was somewhat, if not altogether, novel, by the use of caissons in the place of coffer-dams, and the specification and drawings were prepared on that footing. The contract referred to the specification, and, for the purpose of what I have to say, I will assume that the specification must be read into the contract. The specification provided, as is usual in cases of the kind, with regard to extra or varied work, that extra or varied work should be certified and accounted for, and paid for at certain specification prices. The Plaintiff in this case (the Appellant) says that when he came to perform the work the upper part of the caissons, inside of which the pier was to be built, was found, if constructed, as it was constructed, according to this specification, to be unable in point of strength to stand the pressure and the force of the stream; that therefore the upper part of the caisson had to be abandoned, the lower part remained in the river, and the lower part of the pier was built inside the lower part of the caisson up to low-water mark; that, in consequence of its becoming necessary to abandon the upper part of the caisson in place of building inside the caisson above low water mark, the work had to be done between low and high water, when it could be done without the impediment of the river at that height—and that that occasioned, as it obviously would, great delay in point of time, and considerably more expense in point of outlay.

My Lords, it appears to me, that under those circumstances, the Appellant must necessarily be in this dilemma, either the additional and varied work which was thus occasioned is the kind of additional and varied work contemplated by the contract, or it is not. If it is the kind of additional or varied work contemplated by the contract, he must be paid for it, and will be paid for it, according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that it is not within the contract at all; then, it appears to me, one of two courses might have been open to him; he might have said: I entirely refuse to go on with the contract—*Non hæc in fœdera veni:* I never intended to construct this work upon this new and unexpected footing. Or he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and if I do it, I must be paid a *quantum meruit* for it. Or, for aught I know, for I wish to express no opinion upon the subject, having gone on with it, he might now, if this is not extra work within the contract, have maintained a proceeding for remuneration upon a *quantum meruit* for the extra work he so did. I repeat, I give no opinion whatever upon that point; but it appears to me that those courses were the only courses open to him. But that which he comes here for now is not remuneration under the contract at all; it is neither remuneration fixed by the engineer, nor remuneration on a *quantum meruit.* It is a proceeding, first according to the declaration, then in the words of the special case, upon a warranty, and for damages as for a breach of the warranty.

Now, my Lords, I own that that raises, as it appears to me, a very serious and a very alarming question, if it were to be entertained, or if it should be held that upon such a footing the Appellant could succeed. The proposition which would be affirmed would not go merely to the present case, but would go to nearly every kind of work in which a contractor is employed, and in which, for convenience, specifications of the details of the work are issued by the person who desires to employ the contractor. In those specifications, and in the contracts founded upon them, an elasticity or latitude is always given by provisions for extra additional and expected work; but if it were to be held that there is, with regard to the specification itself, an implied warranty on the part of the person who invites tenders for the contract, that the work can be done in the way and under the conditions mentioned in the specification, so that he is to be liable in damages if it is found that it cannot be so done, the consequences, I say, my Lords, would be most alarming. They would be consequences which would go to every person who, having employed an architect to prepare a plan for a house, afterwards enters into a contract to have the house built according to that plan. They would go to every case in which any work was invited to be done according to a specification, however unexpected might be the results from that work when it came actually to be executed.

My Lords, it is not contended that there is any express warranty whatever on the face of any of the documents in this case. The question may readily be asked, Is it natural to suppose that any warranty can have been intended or implied between these parties? Is it natural to suppose, can it be supposed for a moment, that the Defendants intended to imply any such warranty? My Lords, if the contractor in this case had gone to the Bridge Committee, then engaged in superintending the work, and had said: You want *Blackfriars Bridge* to be rebuilt; you have got specifications prepared by Mr. *Cubitt;* you ask me to tender for the contract; will you engage and warrant to me that the bridge can be built by caissons in this way which Mr. *Cubitt* thinks feasible, but which I have never seen before put in practice. What would the committee have answered? Can any person for a moment entertain any reasonable doubt as to the answer he would have received? He would have been told: You know Mr. *Cubitt* as well as we do; we, like you, rely on him—we must rely on him; we do not warrant Mr. *Cubitt* or his plans; you are as able to judge as we are whether his plans can be carried into effect or not; if you like to rely on them, well and good; if you do not, you can either have them tested by an engineer of your own, or you need not undertake the work; others will do it.

My Lords, it is really contrary to every kind of probability to suppose that any warranty could have been intended or implied between the parties; and if there is no express warranty, your Lordships cannot imply a warranty, unless from the circumstances of the work some warranty must have been necessary, which clearly is not the case here, or, unless the probability is so strong that the parties intended a warranty, that you cannot resist the application of the doctrine of implied warranty.

Now, my Lords, that appears to me to exhaust the whole of this case. If this contractor is entitled to remuneration for the services he performed, it must be sought, or ought to have been sought, in a way different from the present. Damages as for a breach of warranty he is, in my opinion, in no respect entitled to; and therefore I move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

H. L. (E.)
1876
THORN
v.
MAYOR AND
COMMONALTY
OF LONDON.

LORD CHELMSFORD :—

My Lords, the question which alone is open to the Appellant on the special case is, whether the Defendants are liable to him upon a warranty either in the terms stated in the declaration, or to give him a cause of action. The case of the Appellant is not that there was any express warranty, but that, from the facts and circumstances of the case, a warranty by the Defendants to the effect stated in the declaration must be implied.

The contract entered into between the Appellant and the Defendants originated in an advertisement issued by the corporation inviting tenders for the rebuilding of *Blackfriars Bridge* according to certain plans and specifications, which it was stated might be seen, and farther particulars obtained at the office of Mr. *Cubitt*, the engineer for the corporation. It appears that the ordinary mode of proceeding to lay the foundations and build the piers of a bridge is, by the construction of timber coffer-dams which exclude the tidal water and enable the work to be continued uninterruptedly in every state of the tide. By this specification, instead of coffer-dams, the foundations of the piers are to be laid by means of iron caissons, and minute details are given of the quantity of iron to be used in the caissons, the form and dimension of the iron work, and the means of making them water-tight.

The Plaintiff's tender for the work having been accepted, he executed a deed by which he agreed to perform, under the superintendence and according to the directions of the engineer, all the works of every description which should be required to be made, done, and executed, in building the new bridge, including all piers, &c., according to the specification and drawings. The caissons were found not to be of sufficient strength to resist the pressure of the water, and it became necessary to make great alterations in them, which brought them considerably below high water-mark, and the piers could then only be completed by tide work. This occasioned great delay in the execution of the whole work, and the Appellant sustained in consequence great loss and damage, which he alleges that, upon the facts of the case, the Defendants must be taken to have warranted him against.

I think the difference of opinion between two of the Judges as to whether the caissons are to be considered as work to be done, or as the mode of performing the work, like the scaffolding necessary for the building of a house, is quite immaterial. The Plaintiff, by his contract, bound himself to execute the works of every description which should be required in building the new bridge, including the piers, according to the specification. Therefore in whatever light the caissons are to be regarded, the Appellant was bound to employ them in the construction of the piers.

It is stated in the special case that, "The difficulties in carrying out the work in accordance with the plans and designs of the engineer of the corporation, in the several respects before-mentioned, were not known by the contractors at the time of entering into the said contract, although the same might have been discovered on careful examination of the specification and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment, before and at the time of tendering for the contract, a civil engineer who saw the plans, but no such careful examination had, in fact, been made by him or by any other person on behalf of the contractors."

This passage Mr. *Benjamin* ingeniously turns against the engineer of the Defendants, and urges it as proof that he could not have made a careful examination before he devised the new plan for the construction of the piers and prepared the specification. And he argued that, the engineer being originally in fault, no objection lay against the Plaintiff on the ground of contributory negligence. It is unnecessary to consider the validity of this argument, but assuming that there was a want of care and skill on the part of the engineer, how does the act of the Defendants in issuing the advertisement inviting tenders for the work according to the specification, and referring to the engineer for farther particulars, imply a warranty that the work was capable of being carried out upon the terms and under the conditions contained in the specifications.

But it is argued on behalf of the Plaintiff that from the contract itself a warranty may be implied on the part of the Defendants, that there are several clauses in which the Defendants expressly state they will not guarantee certain things, and that, upon the maxim *Expressio unius est exclusio alterius*, there is an implied warranty in every case which is not expressly excluded. This is certainly a novel application, if not a total change of the purpose of the maxim, for the Plaintiff's argument really is, that *Exclusio unius est expressio alterius*, that the exclusion of a warranty as to certain parts of the contract is an admission of a warranty as to the other parts. There is no principle upon which such a rule of law could exist; and certainly nothing approaching to it has ever been established.

There can be no doubt that the Plaintiff, in the exercise of common prudence, before he made his tender, ought to have informed himself of all the particulars connected with the work, and especially as to the practicability of executing every part of the work contained in the specification, according to the specified terms and conditions. It is said that it would be very inconvenient to require an intended contractor to make himself thoroughly acquainted with the specification, as it would be necessary upon each occasion for him to have an engineer by his side. Such an imagined inconvenience is inapplicable in this case, as it appears that the Plaintiff had his engineer, who examined the specification for him, though not carefully. But if the contractor ought prudently and properly to have full information of the nature of the work he is preparing to undertake, and the advice of a skilful person is necessary to enable him to understand the specification, is it any reason for not employing such a person that it would add to the expense of the contractor before making his tender? It is also said that it is the usage of contractors to rely on the specification, and not to examine it particularly for themselves. If so, it is an usage of blind confidence of the most unreasonable description.

The Appellant having entered into the contract with the neglect of all proper precautions, and trusting solely to the specification in a case in which the proposed substitution of iron caissons for coffer-dams was an entire novelty, and the progress of the work having disclosed the inefficiency of the plan of working described in the specification, which he might by careful examination have discovered beforehand, he endeavours to throw upon the Defendants the consequences of his own neglect to inform himself of the nature of the work he was preparing to undertake, by alleging that there was an implied warranty by them that the bridge could be built according to the plans and specification, and that the caissons shewn on the plans would answer the purpose of excluding the tidal water during the construction of the bridge.

If the Plaintiff had considered, as he was bound to do, the terms of the specification, he would either have abstained from tendering for the work, or he would have asked the Defendants to protect him from the loss he was likely to sustain if the plan of working described in the specification should turn out to be an improper one. It is unnecessary to speculate upon what the answer would have been to such an application. But I think we may fairly assume that if the Defendants had been asked for an express warranty to the effect alleged in the declaration, they would have refused to give it.

I cannot see any principle upon which, from the facts of the case, an implied warranty can be imported into the contract making the Defendants liable for the loss which the contractor has sustained by the delay caused by the insufficiency of the caissons to stand the work for which they were intended. I agree that the judgment should be affirmed.

LORD HATHERLEY:—

My Lords, I entertain the same opinion as that expressed by my noble and learned friends, and after what has been said it is only necessary for me, inasmuch as different grounds have, to a certain extent, been relied on by the judges in the Court below, to state on what grounds it appears to me to be absolutely necessary that the conclusion must be arrived at, by your Lordships, which was arrived at by the whole body of the Judges when the case was before them.

My Lords, I put it exactly on those grounds upon which my noble and learned friend on the woolsack has put it, that the Plaintiff here is placed in this extreme difficulty. It is not only that he comes here upon a case in which the proposition he contends for is not found to be supported by any authority at all, but he is inevitably in the dilemma of being obliged to say one of two things, each of which is adverse to him. He may either say: This work which I have done and for which I now claim to be

H. L. (E.)
1876
THORN
v.
MAYOR AND
COMMONALTY
OF LONDON.

paid either by way of damages (that is the mode, and the only mode in which it was put by the case originally brought before the Court), or if not by way of damages, then by way of a *quantum meruit* as within the contract; or he may say that it was not within the contract. On the one hand, if it was within the contract, then of course it would be paid for in the manner provided by the terms of the contract, which are full and explicit as to all the work done in pursuance, (I agree with Mr. *Bompas* in his able argument on this point,) and only done in pursuance, of the engagement entered into. He must be paid for it, as it is provided that all such works are to be paid for, namely, upon the amount of extras, that is to say, upon the additional work over and above the amount of work agreed to be executed under the contract. Then, of course, he would have no difficulty in obtaining his remedy.

On the other hand, if it was outside the contract, I apprehend his course would be very clear—clear, at all events, in one sense. No doubt contractors find themselves hampered by the very strong provisions which are usually contained in engagements of this kind, but still in point of law the case would have been clear if he had said: This not being within my engagement, I will have nothing to say to this farther work. I have performed (as Mr. *Benjamin* once or twice forcibly put it) all the work my contract requires me to do: the contract is fulfilled; it is not a question of deviating from the contract, or of not carrying the work contracted for into effect; the work has been carried into effect, and now you are calling upon me to do something new; that must be the subject of a wholly new engagement. I will not enter upon the performance of that work until a new contract has been made according to the character and nature of the new work. You have ordered me to do what is outside the contract altogether.

My Lords, in neither of these cases could he recover, because in the one case, if the transaction be within the contract, it is already sufficiently provided for, and he has been paid for it; and in the other case there is nothing to shew that he entered into such new engagement at all. All that we have stated to us in the case is, that he was directed to do the work in question, and being so directed, he made no objection to it. It was ingeniously attempted by Mr. *Bompas*, in the last part of his argument, to say, If anybody directs you to do that which he has no right to direct you to do without remunerating you, he must be held to be under a contract to pay *quantum meruit.* The answer is, that that is not the case before us here. Whether that might be had recourse to in any other form of action it is not for us to say. We have neither the form of case nor the statements which would enable us to arrive at a conclusion on the subject. All we have before us is a declaration stating that there was an implied engagement or warranty entered into on the part of the Defendants with reference to the mode in which this work was to be executed, and a special case stated, upon which we are asked to inquire whether or not there was any such implied warranty as is stated in the declaration, "*or,*" as would give rise to a claim for remuneration, the word "warranty" being necessary to the terms of the question. The grammatical construction requires, and no other construction could be put upon it, that the meaning of the word "warranty" there, is, either a warranty such as is stated in the declaration, or such warranty as would give this right of action. And if we should find that there is such a warranty (here it is put properly in the conjunctive), if the warranty be found, "*and*" if you find farther, that the facts have occurred which carried that warranty into effect, then the remedy which the Plaintiff seeks is to be accorded to him.

My Lords, if, as has been strongly contended upon this appeal, there can be found any warranty in such a contract as this, I apprehend it would be scarcely possible for any person whatever to enter upon any new work of any description; say the tubular bridge, for instance, which was originally a bold speculation, I believe, on the part of Mr. *Stephenson.* Any work of that kind, which must necessarily be in a great degree speculative, could scarcely be carried into effect if any person entering into a contract for the performance of that work, with a contractor, was to be supposed to have guaranteed to the contractor that the performance of it was possible. We have had no authority for such a doctrine as that cited before us, and I apprehend it will be impossible to find any authority, as indeed none has been found, which has gone any way whatever near to that doctrine as here contended for.

The last authority, *Appleby* v. *Myers* (1), cited by Mr. *Bompas*—a case decided one way in the Court below, and afterwards varied by the Court above—proceeded upon an entirely contrary view of the case, namely, that where there was found to be only such a result occurring as had not been foreseen by either party, you could not proceed on any such doctrine of warranty. No doubt all persons are distinctly bound not to do anything towards impeding their own engagements, but that is a very long way indeed from a case of this description. Supposing the present Defendants had said in so many terms, We, the Corporation of *London*, are about to engage in this very important work, namely, the re-building of *Blackfriars Bridge*, and we have secured for our assistance in laying out the designs for that work the services of an eminent engineer. Supposing they had then proceeded to state who that engineer was, and had named Mr. *Cubitt*, what would that have amounted to? No more than to a representation that they had engaged an engineer—and that that engineer is one of a certain standing in the profession. Does it go a bit beyond that? Does it proceed to say that the engineer is infallible, or has never made a mistake, or can never make a mistake for all time to come, and that the Defendants give a warranty to that effect?

Nothing has been done since the date of entering into the contract by which the Defendants have in any way impeded the execution of the works in the mode proposed by the specification. Instead of being something done after the contract was entered into, the case alleged is that a contract was entered into with the advice of a person, which advice turns out, unfortunately, not to have been so good as might have been expected from his position. That is no representation at all, nor does the contract amount to anything like a representation that "the advice which we have secured is such that you may confidently, acting upon it, enter into this engagement." All that was done was to inform the person with whom the contract was made, of all the surrounding circumstances in which the Defendants were disposed to enter into the contract. The statement of every one of those surrounding circumstances was correct. Mr. *Cubitt* had been employed, and the designs had been prepared by him, but it turned out unfortunately that there was an error made as to the feasibility of executing those designs in the way he contemplated.

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(1) Law Rep. 2 C. P. 651.

Now, my Lords, I am quite clear on the point of principle here. There is nothing, I am sure, to induce your Lordships to lay down a new principle of law by which anybody entering into a contract, must be supposed to have obtained an implied warranty, from the person engaging him, that the contract itself can be fully carried out without impediment, whether that impediment be one he is himself able to foresee or not.

LORD O'HAGAN :—

My Lords, supposing, as I think it is perfectly clear, notwithstanding the extremely able argument that has been addressed to us, that upon the pleadings and the special case, the Plaintiff cannot recover damages as on a *quantum meruit*, and that the question for your Lordships' opinion regards only the implied warranty on which he has relied, I concur fully with my noble and learned friends who have addressed the House.

Confessedly there is no authority in support of the Plaintiff's case. Such an action under such circumstances has never been sustained, and it lies upon the Plaintiff to shew that it is sustainable.

There is no express warranty, and I see no reason for implying one. The parties did not understand, in my opinion, that any warranty was to be given. No such understanding is manifested in the contract or specification, and the notice of the Defendants merely informed contractors as to the place in which they might examine the plans and specifications, and obtain farther particulars for their assistance in deciding for themselves, and with any advice which might be available to them, as to their acceptance of the proposed contract. It did not profess to do more; it gave no indication of a purpose to give such a warranty as is now alleged. And Mr. *Cubitt*, who was named in it, had no power within the scope of his authority indicated in the special case, as engineer or as agent, to warrant anything. At his office needful information was to be got, and the case finds that it was ample to enable the contractors to discover the difficulties in carrying out the work which afterwards affected them so injuriously. They had an engineer, and if he was of "competent skill and knowledge," and had carefully examined the specifications and drawings, the special case informs us that he would have made that important discovery. So that the opportunities of knowledge were really very equal between the parties. It is much to be regretted that the contractors omitted a precaution which in so grave a matter would seem to have been reasonable and wise. It is unfortunate that they should be subjected to such serious loss; but I do not think that your Lordships can intervene to save them from the results of their own improvidence, by making, for the parties, a contract which they never contemplated, and inserting in it a warranty of which no one ever thought, which was never demanded on the one side, and if it had been, would, I feel assured, have been refused upon the other.

On this short ground I think the judgment of the Exchequer Chamber should be affirmed, and the appeal dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

Lords' Journals, 18th February, 1876.

Solicitor for the Appellant: *J. B. Batten.*
Solicitor for the Respondent: *Brand.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
Feb. 21.

THE REPUBLIC OF LIBERIA . . . . . APPELLANTS;

AND

EDWARD FARROW ROYE . . . . RESPONDENT.

Practice—Dismissal of Bill.

The Court of Chancery has not only full power to stay all proceedings in a suit till the Plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself; and where money has been paid into Court, may direct the payment of that money out of Court to the party entitled to it.

Per LORD HATHERLEY:—When any step ought to be taken in a cause, which, in the judgment of the Court, is necessary in order to facilitate the decision of the cause, and default is made, the party in default, if Plaintiff, is liable to have his bill dismissed. And this is not a matter of first impression.

10 Ch D
17 Ch D. 34

THIS was an appeal against an order of Vice-Chancellor *Malins* (1), which had been confirmed by the Lords Justices (2).

Mr. *Edward James Roye*, a merchant in *Liberia*, had been President of that Republic. A loan was raised for the purposes of the Government, and it was alleged that the President had improperly appropriated, for his own political purposes, a considerable part of this loan. He was deposed, and charged with high treason; his son, the present Respondent, who had been in his father's time Secretary to the Treasury, was subjected to a similar charge. The son was acquitted, and came to *England*. The father was condemned; he, however, got out of prison and tried to escape to an English vessel; he was either drowned or killed in making the attempt. Money had been paid on his account into the *Commercial Bank of Liverpool*, and the Republic became Plaintiff in a Chancery suit against the present Respondent, the personal representative of his father, who claimed to be entitled to this money. The bill in Chancery was originally filed on the 6th of December, 1871; it was amended on the 17th of January, 1872; and re-amended on the 11th of July, 1872. The sum claimed from the

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(1) Law Rep. 16 Eq. 179.

(2) Law Rep. 9 Ch. Ap. 569.

Respondent was £4000. By an order of the Court this sum had been paid into Court and invested.

The answer of the Respondent was filed on the 18th of November, 1872, and set up an absolute claim to the sum in dispute. There were intermediate proceedings, and the replication was not filed till the 22nd of January, 1874. On the 31st of May, 1873, an application had been made to Vice-Chancellor *Malins*, who, on that day, made an order that the Republic should, on or before the 2nd of November, 1873, file full and sufficient affidavit or affidavits, to be made by one or more of its officers or ministers, stating whether it has, or has had, in its possession any, and if any, what documents relating to the matters in question in this suit, and accounting for the same. The Appellants alleged that this order had not been served on the solicitors till the 23rd of June, 1873. Many letters passed between the solicitors of the two parties; the subject of this application for discovery, and the time mentioned in the order was several times enlarged. On the 23rd of April, 1874, the Court, on the motion of the Appellants, enlarged the time for the filing of the affidavits to the 12th of July, 1874, and it was ordered that default therein should be certified by the Chief Clerk, and that the money should then be paid out to the Respondent, and that the bill against him should stand dismissed with costs. On the 1st of June and the 17th of June, 1874, affidavits were put in on behalf of the Republic. A summons to consider the sufficiency of the affidavits was taken out, and was adjourned to the 13th of July, as on the previous day the date fixed by the Vice-Chancellor's order would expire; but in the meantime the Appellants applied to the Lords Justices, who, on the 8th of July, made an order, in substance adopting the Vice-Chancellor's order, but giving time to the Republic till the 28th of July to file the required affidavits, till which time the order of the 23rd of April was suspended. On the 18th of July, 1874, Mr. *Jackson*, the Consul-General in this country for the *Republic of Liberia*, filed an affidavit, in which he said that, "according to the best of his knowledge, remembrance, information, and belief," the Plaintiff Republic never had possession of the books and papers removed by the Defendant. The Chief Clerk thought this affidavit to be insufficient. On the 5th of August, 1874, the Chief Clerk certified that the Appellants were in default. On the 7th of August the Appellants took out a summons to vary this certificate, which summons was heard on the 11th of November, 1874, when the Vice-Chancellor, in Chambers, refused to make any order on it. On the 17th of November notice was given of a motion to discharge the order, and this motion was heard on the 12th of January, 1875, when it was refused with costs. This appeal was then brought against the order of the Lords Justices of the 8th of July, 1874, and that of Vice-Chancellor *Malins* of the 12th of January, 1875.

Mr. *Glasse*, Q.C., and Mr. *B. Bickley Rogers*, for the Republic:—

The course which had been taken in this case was not justified by the practice of the Court. There were difficulties in getting an order, such as that of the Vice-Chancellor's, properly obeyed in a place like *Liberia*, where there were no solicitors of skill sufficient to know what would be deemed satisfactory to the Court. The best that could be had been done; and if the affidavit of the Consul-General was not sufficient, farther time ought to have been given. It was, at least, quite premature to dismiss the bill when other affidavits might have been procured.

[*Princess of Wales* v. *Earl of Liverpool* (1) and *United States* v. *Wagner* (2) were referred to and commented on.]

Mr. *Higgins*, Q.C., and Mr. *Langley*, for the Respondent, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this appeal comes before your Lordships from the Court of Chancery upon a question of practice, and upon a question of practice alone; perhaps I should be more correct in saying upon two, if not three, points of practice; and I prefer to take them in succession for the few observations I have to make.

My Lords, your Lordships are called upon in the first place to decide a question which rarely comes before this House for consideration, namely, whether an affidavit as to documents, made on behalf of the Plaintiffs in a suit in Chancery, is or is not a sufficient affidavit. Now, my Lords, I own I have no doubt at all that upon this point the decision of the learned Vice-Chancellor was entirely correct. A foreign Republic was suing in this country. According to the ordinary practice of the Court the Republic, as Plaintiff, was called upon to make a discovery of all documents in its possession. That discovery must be made by an affidavit, and as that affidavit cannot be made by a Republic, it must therefore be made by an officer of the Republic; and accordingly the Vice-Chancellor directed that a full and sufficient affidavit should be made by an officer or officers of the Republic. Whether the affidavit would be full and sufficient would depend, among other things, upon who was the officer of the Republic by whom it was made. Was it an officer who would know anything about that of which he was speaking, or was he a person who, while technically an officer of the Republic, would really be without any knowledge whatever on the subject upon which he was making the affidavit?

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(1) 1 Sw. 114; 3 Sw. 507.

(2) Law Rep. 2 Ch. Ap. 582; see also *Republic of Peru* v. *Weguelin*, Law Rep. 20 Eq. 140.

My Lords, after some delay the officer, the person selected to make the affidavit, was the Consul-General of the Republic in *England*. He knew nothing at all about the documents, which were abroad. What he knew was this, that a certain number of documents had been sent home to *England*, and those of course he could accurately specify as being in *England*. But the material point upon which his information would be important would be not as to the documents in *England*, but by way of negation, for the purpose of assuring the Defendant that there were no other documents abroad relating to the subject-matter. Upon that point all that the Consul-General could say was this, that to the best of his knowledge, information, and belief, there were no such other documents. Of course that could be merely such information as was sent to him. Personal knowledge of the subject he did not profess to have, and from the nature of the case he could not have. The Vice-Chancellor thought that that was not the full and sufficient affidavit which he had desired from an officer of the Republic. If I had any hesitation in coming to that conclusion, I should doubt, very much, the propriety of differing from the Judge who had the whole control and administration of the case. But, my Lords, I own that my mind goes entirely with that of the Vice-Chancellor in saying that I think the Consul-General was not the proper officer of the Republic to make the affidavit, but that some person on the spot, so far as I could see, would have been the proper person to make the affidavit.

Now, my Lords, farther than that, the affidavit being insufficient, there arises the questions of the course taken by the Court as to this suit. Three different opportunities having been given of making this affidavit, and it not having been made, there was an order of the Court made by the Vice-Chancellor, and confirmed by the Lords Justices, that for default of the affidavit the bill should be dismissed, and a sum of money which had been standing at a particular bank to the account of an intestate represented by the Defendant, should be repaid to the Defendant as representing that intestate, and as having a previous and prior claim to the money. My Lords, it has been questioned whether such an order was within the jurisdiction and competence of the Court of Chancery.

My Lords, I have not a shadow of a doubt upon that point. I hold it to be clear and well established that the Court of Chancery has, in the first place, jurisdiction to stay all proceedings in a cause until the Plaintiff has made any discovery which he is called upon by the order of the Court to make. But, my Lords, if the Court of Chancery has power to stay proceedings until a discovery is made, is it to go on constantly staying those proceedings and to go no farther? And above all, is that to be the only course open to it where something has been impounded. Some money taken possession of, the appropriation of which may be extremely inconvenient, indeed may be ruinous to the person from whose hands it is taken? Can anything be supposed more calculated to lead to injustice and wrong than that money should be taken and impounded in the Court of Chancery upon a case alleged by a Plaintiff, which might be displaced by documents in his possession, and that he all the while is to hold his suit, retain the money in Court, and refuse to divulge the documents which would overthrow the title he has alleged? My Lords, that of course is an extreme case. I do not say it is the case before your Lordships, but it shews that the jurisdiction of the Court of Chancery cannot be limited to a mere stay of proceedings. The Court of Chancery must have of necessity the right to go farther, and to say that after a proper interval the proceedings which have been stayed shall be altogether expelled from the Court, and any property which the Court has taken possession of, be restored to the person from whom it was taken. Therefore, my Lords, upon the general and abstract question I entertain no doubt that it was within the jurisdiction of the Court of Chancery to dismiss this bill for default of proper discovery.

Then, my Lords, another question would arise, whether, in the discretion of the Court, a proper length of time, and proper opportunities had been allowed to the Plaintiff Republic to make the discovery. My Lords, upon that point I certainly should be extremely unwilling that your Lordships, upon a mere question of discretion, should open what has been done first by the primary Judge, and then sustained by the unanimous decision of the Court of Appeal in Chancery. The Judge of first instance, the Vice-Chancellor, and the learned Judges of the Court of Appeal, in a case of this kind must be very much better qualified to judge, than your Lordships can be in this House, how far in their discretion latitude should be allowed, and how far time should be given to a Plaintiff under these circumstances. I do not desire to say whether, if it had fallen to me in the first instance to deal with this case, or to sit upon it as a member of the Court of Appeal in Chancery, I might or might not have granted a greater latitude to the Plaintiff and greater indulgence in point of time. My Lords, I think that the main point which your Lordships have to consider is, was the order within the jurisdiction of the Court of Chancery; and if you think, as I believe you will, that it was within the jurisdiction, then I should hold that the discretion having been exercised by the unanimous decision of the Vice-Chancellor and of the Lords Justices, it would indeed be contrary to the practice which I have known to prevail in your Lordships' House, if, upon a question of discretion alone, you were to adopt a different course here and enlarge a latitude which those learned persons have thought has been already sufficiently given to a Plaintiff.

I therefore move your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD:—

I entirely agree.

LORD HATHERLEY:—

My Lords, I have no doubt whatever (and I think I ought to express as much) with respect to the general doctrine. All that we have to consider in this case is as to the power of the Court to deal with a Plaintiff's suit in such a manner as is consonant with the justice of the case. My Lords, it is by no means, I think, a case of first impression, that when any step ought to be taken in the cause, which in the judgment of the Court is necessary to be taken, in order to facilitate the decision of the cause, the party in default in taking that step, if he be the Plaintiff, is liable to have his bill dismissed, whatever be the ground, technically, upon which that may occur, whether it be that he has not brought his witnesses at the right time, whether it be that he has not taken any other step in the suit according to the time prescribed by the orders of the Court, or whether it be that from his neglecting to perform something which he was ordered by the Court to perform, and which the Court thinks is essential to the proper and just consideration of the cause, the Court may take the step in the cause which it has taken here, and say, If you delay your cause so that it cannot be brought to a hearing because you are in default, we shall direct, in case of your farther default in proceeding to expedite it, that the bill shall be dismissed. If money has been paid into Court, it is a matter of course, I had almost said of every day practice, for the Court, upon the dismissal of the bill on the hearing, to direct that the money which has been paid into Court shall be repaid to the person who, having paid the money into Court to await the event of the suit, and the suit being delayed by the default of the Plaintiff, is entitled to ask that the money shall be repaid to him.

My Lords, as respects the special affidavit which was made in this case, I cannot have any doubt whatever that it was insufficient, having regard to the position of the parties. If a defendant, *simpliciter*, one of the persons directly concerned, is asked to make an affidavit as to the state of documents in his possession, then, whatever be the state of the documents within his own knowledge, he is answerable, upon his oath, to state what he knows upon that subject, and when he swears that there were such and such documents and no others, that oath is all that the person asking the discovery of documents is entitled to. But if he is not a person who himself has charge of those documents, as an officer of a corporation, or, as in this case, an officer of a Republic, he must state what are his sources of knowledge, what his means of information are, and it is not enough for him to say, "To the best of my belief these are all the documents that can be had," when it may not be any part of his duty to know anything whatever upon the subject. If he has not explained that properly and sufficiently, the Court has not that which it requires, and which it has a right to have, namely, the sanction of the oath of the proper officer acting on behalf of the Plaintiff (in this suit the *Republic of Liberia*) that those are all the documents. The Consul-General says that these are all the documents in this country, but it appears from the correspondence which has since been going on that there are many other documents in *Liberia*. But it is said that owing to the circumstances which were stated at the Bar, namely, that there are no solicitors there, and no persons skilled in matters connected with the administration of law and getting up cases like the present, and that owing to the want of skill on the part of local parties, the documents cannot be arrived at or enumerated. That being so, it becomes all the more necessary that steps should be taken by some competent person having proper skill, and that the matter should not be left to an officer in this country, however competent he may be in other respects, who happens to be the person carrying on the affairs of the Republic here as the Consul-General. He cannot, as it appears to me, from the information before us, be taken to be the depositary, or to be the person properly informed of the documents which the Republic possesses in relation to this particular suit.

It seems to me, therefore, my Lords, in every point of view, that the order from which this appeal is presented is correct, and whatever degree of hardship there may be in consequence of the time having been unusually short which was given for the production of this affidavit, still that is a point we should hardly deal with. It is a matter for the discretion of the Judges of the two

Courts, and they have exercised their discretion upon it. Therefore all we can do upon the present occasion is to dismiss the appeal with costs.

Lord O'Hagan:—

My Lords, I wish merely to add that I quite concur with the view of the learned Vice-Chancellor, who seems to have acted in this case at once with strict justice and much consideration towards the Appellants. His order was made on the 24th of April, 1874; and repeated opportunities of compliance with it were offered, from time to time, until the 28th of July, 1875, which was fixed by the Lords Justices as the latest day for the filing of the necessary affidavit. The Appellants, although in a distant country, could undoubtedly have fulfilled the duty cast upon them during that considerable period, but they failed to do so, and it was for the learned Judge to consider, in his discretion, whether the proceedings could properly be farther delayed, and the large sum of money, which had been attached, longer detained in Court. He resolved the question in the negative, and that on no light or technical ground—as has been represented at the Bar—but for very substantial reasons. The affidavit was in no way, in the judgment of the Vice-Chancellor, "full and sufficient," according to the terms or the spirit of his order, and he exercised, I think, his undoubted jurisdiction in dismissing the bill, for pertinacious disregard of it. Such a jurisdiction must be inherent in a Court of Equity; and, indeed, the suggestion impeaching its existence was very faintly urged by the learned Counsel for the Appellant. The point was not argued, and was not arguable. The power of the Court to do what has been done was ample; and I agree with my noble and learned friends, that your Lordships' House cannot properly interfere with the mode of its discretionary exercise.

I am, therefore, of opinion that the appeal must be dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 21st February, 1876.

Solicitor for the Appellant: *Edward Smith.*
Solicitor for the Respondent: *Flux & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
Feb. 18, 21, 22.

THE NORTH LONDON RAILWAY COMPANY AND MANSEL (THE GENERAL MANAGER) . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL . . . . . RESPONDENT.

Railway—"Cheap Trains"—Board of Trade—Dispensing Power.

The 5 & 6 Vict. c. 79, s. 4, imposes a duty upon the receipts of railway companies derived from the carrying of passengers. The 7 & 8 Vict. c. 85, for the purpose of securing certain advantages to "the poorer classes of travellers," directs, sect. 6, that all railway companies shall, "by means of one train at the least to travel along their railway from one end to the other of each trunk, branch, or junction line, once at the least each way, on every week day, &c.," "provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations." The 6th section then states seven "conditions." The first requires the train to start at an hour approved by the Lords of the Committee of Trade; second, to travel at the rate of twelve miles an hour, including stoppages; third, to take up and put down passengers at every station it shall pass; fourth, seats and protection from the weather to be provided in a manner satisfactory to the said Lords; fifth, the charge shall not exceed one penny a mile; sixth, each passenger by such train shall be allowed to take with him a half-hundredweight of luggage not merchandise; and seventh, provision is made for the fares of children. The 8th section provides that, "Except as to the amount of fare for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore provided, the Lords, &c., shall have a discretionary power of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such trains, in consideration of such other arrangements in regard to speed, covering from weather, seats, or other particulars, as shall appear to the said Lords more beneficial," &c. The 9th section enacts that no tax shall be paid on receipts from the conveyance of passengers at fares not exceeding one penny a mile by any such cheap trains as aforesaid:—

Held, that the first three and the fifth of the "conditions" contained in the 6th section were absolute, and were not affected by the dispensing power given in the 8th section, for that the dispensing power applied only to "conditions hereinbefore required in regard to the conveyance of passengers by such trains" as therein specified.

Train A of the *North London Railway* started from the main terminus at *Broad Street*, and ran to *Dalston Junction*, taking passengers at a penny a mile, and stopping at every station:—

Held, that so far it was a cheap train, and was within the exemption from the tax.

Train B started a little later from *Broad Street*, did not stop at the intervening stations, and came up with train A at *Dalston*. There, the original passengers of train A (there being no unreasonable delay) got into it and proceeded to *Kew*, stopping at every station, paying a fare of only a penny a mile, and performing the journey at the rate of twelve miles an hour, including stoppages:—

Held, that train B was, as from *Dalston Junction*, to be considered as a continuation of train A, and that the exemption therefore applied to it; but that, so far as concerned train B in its passage from *Broad Street* to *Dalston*, it was not to be considered as a cheap train, for that no train was to be treated as a cheap train where the fare exceeded one penny a mile, and where the train did not stop at every (not merely every ordinary) passenger station on the line between one terminus and another:

Semble, per Lord Chelmsford:—If a railway company should have one train a day which conformed to all the requirements of the Act, and should be desirous of running other additional cheap trains on the same lines, which should not be obliged to stop at every station, the Board of Trade might dispense with the condition as to these additional trains, and by such dispensation exempt the company from payment of duty.

THIS was an appeal against a decree of the Court of Exchequer (Revenue) on an information filed by the Attorney-General against the present Appellants to obtain from them payment of certain duties alleged to be owing to Her Majesty under the statute 5 & 6 Vict. c. 79, s. 4, and Sched., as affected by the provisions of the *Cheap Trains Act*, 7 & 8 Vict. c. 85, ss. 6, 8, 9 (1).

The earlier statute imposed the duty of £5 upon every £100 received for passenger fares by railway. The later statute contained the enactments which created exemptions, the nature and extent of which constituted the questions to be decided in the present case. The 6th section of the 7 & 8 Vict. c. 85, after reciting that it was expedient to secure to the poorer class of travellers, travelling at moderate fares and in carriages protected from the weather, enacted that "all passenger railway companies shall, by means of one train at the least to travel along their railway from one end to the other of each trunk, branch, or junction line belonging to or leased by them, &c., once at the least every week day, provide for the conveyance of third-class passengers, to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several Acts of Parliament, and with the immunities applicable by law to

(1) Law Rep. 9 Ex. 330.

H. L. (E.)
1876

NORTH LONDON RAILWAY CO. v. ATTORNEY-GENERAL.

carriers of passengers by railway; and also under the following Conditions:

1. Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Lords of the Committee of Privy Council for Trade and Plantations (the Board of Trade).
2. Such train shall travel at an average rate of speed not less than twelve miles an hour for the whole distance travelled on the railway, including stoppages.
3. Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line.
4. The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected from the weather, in a manner satisfactory to the Board of Trade.
5. The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled.
6. Each passenger by such train shall be allowed to take with him a half-hundredweight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge, and any excess of luggage shall be charged by weight, at a rate not exceeding the lowest rate of charge for passenger luggage by other trains.
7. Children under three years of age not to be paid for; children above that age to pay half the charge for an adult.

The 7th section imposes penalties for non-compliance with the provisions as to cheap trains.

The 8th section provides: "That, except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore in such case provided, the Lords, &c., shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyence of passengers by such cheap trains as aforesaid, in consideration of such other arrangements, either in regard to speed, covering from the weather, seats, or other particulars, as to the Lords, &c.,

shall appear more beneficial and convenient for the passengers by such cheap trains under the circumstances of the case, and shall be sanctioned by them accordingly; and any railway company which shall conform to such other conditions as shall be sanctioned by the Lords, &c., shall not be liable to any penalty for not observing the conditions which shall have been so dispensed with by the Lords, &c., in regard to the said cheap trains, and the passengers conveyed thereby." . . .

Sect. 9. "No tax shall be levied upon the receipts of any railway company from the conveyance of passengers, at fares not exceeding one penny for each mile, by any such cheap train as aforesaid."

The *North London Railway Company* was constituted of different smaller companies which had been amalgamated with it, and it ran trains upon the lines of other companies in connection with it, but it might be described as having a starting station at *Broad Street,* in the City, whence the trains ran in a northerly direction to *Dalston Junction,* where, for convenience' sake, there was a triangular formation of rails, and from that junction trains went eastward to *Poplar* and *Blackwall,* and westward to *Camden Town* and *Chalk Farm.* At *Camden Town* there was another junction —passengers who desired to go south-westward to *Kew,* getting out there to change carriages for *Kew.*

The Appellants on their system only used two classes of carriages—first and second, and passengers who, under the circumstances next mentioned, paid only "third-class" fares, rode in the second-class carriages.

In most cases the fares by the second class were less than at the rate of one penny per mile. In some cases where they did exceed this limit, "third-class" tickets were issued for certain trains. Passengers taking such tickets travelled in the second class-carriages only, there being no carriages expressly designated as "third-class" carriages.

The Appellants issued second-class "return" tickets. If the forward journey and the return journey were both performed, the whole charge upon each of such tickets would not exceed one penny a mile, but the charge would exceed that rate if the person taking such a ticket did not perform the double journey.

"Workmen's tickets" were also issued between *Broad Street* and *Dalston Junction*. By these, workmen could pass or stop at *Shoreditch, Kingsland,* and *Haggerston* stations. The cost of these tickets would (except in the case of going only to *Shoreditch*) be less than one penny per mile. Attached to these workmen's tickets were conditions that "each holder of a workman's ticket will be allowed to carry, at his exclusive risk, any tools not exceeding 28 lbs. weight. . . . No other luggage of any description will be conveyed free of charge with the holders of workmen's tickets."

The information admitted that the Lords of the Committee of Trade had given formal "approval" for all the trains in the time tables of the Defendants for the month of November, 1870; it denied the existence of more convenient arrangements, and alleged that the Lords had not sanctioned any such, and that no reason existed why any of the trains run over the Defendants' line should be approved as cheap trains.

The information claimed duty in respect of—

1. Fares charged to certain passengers by certain trains which the Defendants advertised as third-class trains.

2. Fares charged to second-class passengers where such fares did not exceed the parliamentary rate of fare.

3. Fares charged for certain return tickets issued to second-class passengers.

4. Fares charged to workmen for workmen's tickets.

The contention of the Attorney-General was—

1. That in the absence of any third-class carriages a train ought not to be considered a "cheap train" within the meaning of the Act.

2. That even assuming it might claim the character of a "cheap train," the only fares that came within the exemption were those paid by persons who asked for "third-class" tickets.

3. That no train which did not stop at every ordinary passenger station between the terminal stations, and which did not carry passengers to all the stations at which they did stop at the parliamentary rate, was a "cheap train" within the meaning of the Act, and that, consequently, the fare of no passenger travelling by it, of whatever class, could be within the exemption.

H. L. (E.)
1876
NORTH LONDON RAILWAY CO. v. ATTORNEY-GENERAL.

The Court of Exchequer made a decree declaring—

1. That every train running from one end to the other between *Broad Street* and *Poplar*, or *Broad Street* and *Chalk Farm*, and *Kew Bridge* and *Richmond*, or between other terminal stations, and conveying passengers to and from such terminal and every intermediate ordinary passenger station, at fares not exceeding the parliamentary rate, and complying with the several other conditions mentioned in the 6th section of 7 & 8 Vict. c. 85, so far as they have not been properly dispensed with by the Board of Trade, ought to be considered a cheap train within the meaning of the Act, notwithstanding there may be no third-class carriages in such train. And the fares of passengers by such train are entitled to exemption if they do not exceed the parliamentary rate, whether the tickets issued are second or third class, and such exemption is not lost by passengers being required for the convenience of traffic, to change from one line to another during the journey, provided there is no unreasonable delay or diminution of the speed required by the Act. But no train was to be considered a "cheap train" within the meaning of the Act, whether approved by the Board of Trade or not, which did not stop at every intermediate ordinary passenger station, and did not convey some class of passengers to and from every station, at fares not exceeding the parliamentary rate; and that no exemption ought to be allowed in respect of the fares of the passengers by any such train, notwithstanding such fares may not exceed the parliamentary rate. That fares received for return tickets are not exempt from duty, unless the fares that would be charged to the same class of passengers for the single journey, over the same distance, would not exceed the parliamentary rate. That the fares received for workmen's tickets are not exempt from duty.

This was an appeal against that declaration.

Mr. *Joseph Brown*, Q.C., and Mr. *F. Meadows White* (Mr. *Tyrrel Paine* was with them), for the Appellants:—

This case involves the construction of certain sections in an Act of Parliament, and as they relate to the taxation of the subject, they are to be construed favourably to the subject. [THE LORD

CHANCELLOR:—The Act which imposes the duty is not in question. The discussion here is on the meaning of the sections of an Act which creates exemption from the duty.] It is quite clear that the Legislature intended to create arrangements which should be favourable to the poorer classes of passengers, and if additional accommodation and advantages were given to them, that was to be treated as a consideration in virtue of which the receipts of the company might be, so far, exempted from the tax. That consideration was given here. In many respects the persons who only paid third-class fares enjoyed the advantages of second-class passengers. It is true that there were no third-class carriages, expressly so named, but the third-class passengers, those who paid only the parliamentary fare, were enabled to ride in second-class carriages. That was a consideration which fully authorized the Board of Trade in exercising its dispensing powers. If persons rode in second-class carriages, paying only third-class fares, they received a benefit greater even than the Act intended to secure them, and the exemption from the duty was fully warranted. On that part of the case, therefore, the Attorney-General has no right to claim the duty.

Then as to stopping at every station. There is at least one train a day which literally complies with the provisions of the statute. There are others which do so in fact, and are therefore entitled to the exemption. If a train starts from *Broad Street*, and stops at every station up to *Dalston*, and is there overtaken by a train which does not stop till it reaches *Dalston*, but after that point stops everywhere, and the charge does not exceed a penny a mile for a certain class of passengers, and the passengers who had arrived by the first train can, with no unreasonable delay, go on with the overtaking train, which then stops everywhere, they paying only one penny a mile, the whole train becomes a cheap train within the meaning of the statute, and is entitled to exemption. The Court of Exchequer has determined that the mere changing from one train to another, the change being rendered necessary by circumstances, and the delay in the change being not unreasonable, will not affect the question as to its being a cheap train. That is the only matter to be considered; the great advantages given to the third-class passengers by such an

H. L. (E.)
1876
NORTH LONDON RAILWAY CO. *v.* ATTORNEY-GENERAL.

arrangement being a good consideration for treating the whole as a cheap train. It cannot be, because some of the stations in the line of that train have been in the first instance passed by, therefore the train is to lose its character of a cheap train, when all the rest of the journey is performed in that character. By nearly all the trains the poorer classes can get to all the stations at the parliamentary fare, and that justifies the exemption. [Sir *H. James* suggested that if a person desired a third-class ticket from *Canonbury* station, he could not get to any other station at the parliamentary rate, unless he went by the early train in the morning, or the late train in the afternoon.] This difficulty is not admitted—but, supposing there was an individual instance of that kind, it would not take away the exemption when the railway carried passengers in the form prescribed by the Act, to almost all the railway stations, if not absolutely to all. If there were sixty stations, and the train stopped at fifty-eight, the fact that it did not stop at all the sixty would not deprive it of its character of a cheap train (1).

Sir *H. James*, Q.C., and Mr. *W. W. Karslake* (Sir *H. Giffard, S-G.*, was with them), for the Respondent:—

The Legislature intended that every train claiming exemption as a cheap train should be formed in a certain manner, should have certain tickets issued to its passengers, should have a certain fixed fare per mile for each passenger, and should stop at every station on the line. The Court of Exchequer limited this provision to every ordinary passenger station. But the statute permits no such limitation: it requires the train to stop "at every passenger station which it shall pass on the line." The Legislature used very clear and simple directions, and did not intend that railway companies should manipulate and mould these directions as suited their convenience, and yet claim the exemption from duty which the *Stamp Act* had imposed. It was impossible to argue, because the company, with one train a day, performed the conditions which made a train a cheap train between *Broad Street* and *Chalk*

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(1) The questions as to return tickets and workmen's tickets, which were the subjects of decision in the Court below, were referred to in the course of the argument, but formed no part of the judgment of the House.

Farm, that therefore between these places, or between *Dalston* and *Blackwall*, where these conditions were not equally observed, it still retained its character of a cheap train, and was entitled to exemption from duty. That was the nature of the argument on the other side; beginning as a cheap train, or ending as a cheap train, that argument amounted to saying that it was to be treated as a cheap train throughout.

Mr. *Joseph Brown* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case an information was filed in the Court of Exchequer, as a Court of Revenue, for the purpose of obtaining the decision of the Court upon certain matters which were in controversy between the Crown on the one hand, and the *North London Railway Company* on the other, touching the duty or tax imposed upon the receipts of the railway company by Act of Parliament. The declaration of the Court was obtained upon the various matters which were thus in controversy, and in the result that declaration has been acquiesced in on both sides upon all points except two, which are now submitted to your Lordships' opinion by way of review.

My Lords, I will take those two points in order; and for the purpose of expressing the opinion which I have formed upon the first of them, I will remind your Lordships that the Act of Parliament, which is commonly called the "*Cheap Trains Act*" (the 7 & 8 Vict. c. 85), inaugurated for the first time the system of cheap or parliamentary trains; and the enacting clause contained in that Act provided that all companies within the purview of that Act—that is all railway companies whatever—should "by means of one train at the least, to travel along their railway from one end to the other of each trunk, branch, or junction line, belonging to or leased by them, so long as they should continue to carry other passengers over such trunk, branch, or junction line, once at the least each way on every week day except Christmas Day and Good Friday (such exception not to extend to *Scotland*), provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway, under the obligations contained in their several Acts of Parliament, "under the following conditions." Then came certain conditions, which I will pass over for the present, although I shall have to advert to them afterwards. And then the 8th clause provided that, "Except as to the amount of fare or charge for each passenger by such cheap trains" (that fare or charge was one penny a mile) "which shall in no case exceed the rates hereinbefore in such case provided" (namely, one penny a mile), "the Lords of the said committee" (the Board of Trade) "shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid," in consideration of certain benefits to be obtained for the public on the other hand. Then, my Lords, the 9th section provided that "no tax shall be levied upon the receipts of any railway company from the conveyance of passengers at fares not exceeding one penny for each mile by any such cheap train as aforesaid."

My Lords, the duty imposed upon the receipts of railway companies had been imposed by an earlier Act of Parliament, and the effect of the Act to which I am now referring was that the receipts of railway companies for the carriage of passengers at a rate not exceeding one penny a mile provided they were carried "by any such cheap train as aforesaid," were exempted from the tax or duty imposed by the earlier Act.

Now, my Lords, the first question which arises in this case is this. The *North London Railway Company* has established a service in which there are one or more trains of the description which I am about to give. Those trains start from the terminus of the company, and they start at an hour approved of by the Board of Trade; they stop at every passenger station along the line—in those respects, therefore, they comply with all the requirements of the Act. With regard to the greater number—it is said by far the greater number—of the stations at which they stop they carry third-class passengers to and from these stations at rates not exceeding one penny a mile for the distance travelled. But there are certain stations (and for the present purpose it does not matter whether they are more or less numerous) at which these trains stop, where, whether from oversight or otherwise, I know not, the

H. L. (E.)
1876
North London Railway Co. v. Attorney-General.

rates have been adjusted in such a way that they are somewhat above the parliamentary rate of a penny a mile, and the question is, whether a train complying with the provisions of the Act of Parliament in all other respects but that which I have mentioned, is deprived of the benefit of the exemption given by this Act of Parliament because there are certain stations to which the rate exceeds one penny a mile.

My Lords, if the matter stood there alone, of course there could not be any doubt that that could not be a compliance with the Act of Parliament. But it is said that the Board of Trade has dispensed in those cases which I have mentioned with the literal compliance with the Act of Parliament, and it is admitted between the parties that if the Board of Trade had the power so to dispense with the requirements of the Act, it has done so. My Lords, in my opinion, the Board of Trade has not the power to dispense with that condition. The words of the Act of Parliament are express. Whatever other dispensing power is given by the 8th section of the Act to the Board of Trade (and that I shall have to consider on the second point) this is excepted altogether out of that dispensing power "the amount of fare or charge for each passenger by such cheap trains." Now, my Lords, can it make any difference that the fare in excess of one penny a mile is only charged to certain stations and not to all? If the Board of Trade has the power to dispense with the obligation of the Act of Parliament as to one station, it has also as to two; and if as to two, it has as to all. The result of the argument, therefore, must be that the Board of Trade may dispense with the observance of the parliamentary rate as to one or more or as to all the stations upon the line. And if that be so it would be simply arming the Board of Trade with the power to do the very thing which has been excepted out of its power by the 8th section itself.

My Lords, upon the first point of the case, I apprehend there really can be no doubt, and your Lordships did not call upon the learned counsel who appeared for the Crown to argue it. I pass, therefore, to the second, and by far the most difficult, question in the case.

Now, my Lords, in order to explain how the second question arises, your Lordships will allow me to remind you of the very simple facts which are to be borne in mind in reference to it. The terminus to which we are looking, as I have said already, is the *Broad Street* terminus. From *Broad Street* the line of this railway company goes for a certain distance in a northerly direction, and there comes to a junction with another line. From that junction it turns away to the west or north-west, and finds its course ultimately to *Kew* and to *Richmond.* There are several stations between *Broad Street* and the junction, and several others between the junction and *Kew* and *Richmond.* There are certain trains arranged in this manner; one of them will start from *Broad Street,* and will stop at every station upon the line between *Broad Street* and the junction; another train will start from *Broad Street* somewhat later, it will not stop at all the stations between *Broad Street* and the junction, and at the junction it will overtake, as it were, or come up with the passengers who left by the earlier train, and it will, if desired, take these passengers on, stopping at all the stations between the junction and *Kew* or *Richmond.* Now, if the earlier of those two trains, the train that I may call the stopping train, complies in other respects with the Act of Parliament, and has its fares so adjusted that they nowhere exceed one penny a mile, it is not questioned by the Crown but that the parliamentary traffic by that train will be exempt from the duty, that is to say, that the fare paid by a passenger who leaves by that earlier train, goes on by it to the junction, and is there taken up by the faster train and is carried on to *Richmond* at the fare, and in the manner required by the Act, will be exempt from duty. But it is said on behalf of the Crown with regard to the traffic which starts by the later train, the faster of the two, that that traffic is not exempt from duty, because that train does not stop at all the stations between *Broad Street* and the junction. And there again, my Lords, comes in the farther question as to the dispensing power of the Board of Trade, because if the Board of Trade has this power, it is admitted between the parties that, with regard to the second train also, the Board of Trade has dispensed with any obligation that it should stop at the stations at which it does not stop; and therefore if the Board of Trade has the dispensing power, that faster train will have been pronounced by the Board of Trade to be a parliamentary train. The question, therefore, really is, has the Board of Trade this dispensing power?

Now, my Lords, for the purpose of deciding this question your Lordships will find it necessary to look a little more minutely at the enactments in the Act of Parliament than I have already done. I have read to your Lordships the words of the 6th section up to a certain point. That 6th section laid upon all companies the obligation that they should, by means of one train, at the least, to travel along the railway from end to end, once at the least each way, every day, "provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway under the obligations contained in their several Acts of Parliament." My Lords, if it stopped there, there could be no doubt that the obligation of the company, to be fulfilled before any train could be claimed to have complied with this section, would be that the train should pass from end to end of the line, that it should do that within the time, and that it should convey third-class passengers to and from every ordinary passenger station on the line.

The clause continues "under the following conditions;" Here are imposed, therefore, certain specific conditions in addition to what I have already read; they are seven in number. The first is that the train shall start at an hour to be approved of by the Board of Trade; the second, that it shall travel not less than twelve miles an hour including stoppages; the third, that the train shall, "if required, take up and set down passengers at every passenger station which it shall pass on the line;" the fourth is that, "The carriages in which passengers shall be conveyed by such train shall be provided with seats, and shall be protected from the weather in a manner satisfactory" to the Board of Trade; the fifth is, "The fare or charge for each third-class passenger by such train shall not exceed one penny for each mile travelled;" the sixth, that every passenger shall be allowed a certain weight of luggage which I need not particularize; the seventh, and last, that children under and above three years of age shall be carried upon certain terms. Those are the seven conditions.

Then, my Lords, when we come to the 8th section of the Act, or the dispensing clause (the power given to the Board of Trade to dispense), we find that it runs thus. It is enacted: "That except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore in such case provided, the Lords of the said Committee shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid, in consideration of such other arrangements, either in regard to speed, covering from the weather, seats, or other particulars, as to the Lords of the Committee shall appear more beneficial and convenient for the passengers by such cheap trains under the circumstances of the case." There is, therefore, a power given to the Board of Trade to dispense on certain terms with any of the conditions thus described, "any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid." But that dispensing power is not to go to the extent of allowing the Board of Trade to interfere with "the amount of fare or charge for each passenger" by the cheap train, which is in no case to exceed the penny a mile.

Now, my Lords, upon that the Court of Exchequer has come to the conclusion that the Board of Trade has not the power to dispense with the obligation laid upon the railway company, to stop a train, which it desires should have the character of a cheap train, at every one of its passenger stations, and the Court of Exchequer had arrived at that conclusion by this process of reasoning. The Court holds that there is indeed a condition that a train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line; and the Court, as I understand the judgment, holds that that is a condition which, if properly interpreted, the Board of Trade has the power of dispensing with. But the Court of Exchequer holds that the proper interpretation of that condition is that it refers, not to what we term the ordinary stations along the line of railway, but to those stations where the train does not ordinarily stop, but where it has some habit of stopping at the requisition of certain individuals, the owners of certain properties, or of stopping by signal, or of stopping for the purpose, not of the general traffic, but of some particular market or fair on some particular day. Regarding this condition as applying to stations of that description, and not to ordinary passenger stations, the Court holds that the obligation to stop at ordinary passenger stations is not contained in the condition which I have read, but is contained in the earlier part of the section, namely that part which defines the essence of a cheap train, and declares that the company shall "provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway." Therefore, says the Court of Exchequer, you have, as of the essence of this cheap or parliamentary train, the duty of stopping at every passenger station imposed upon you by the earlier part of the section, and with that there is no power in the Board of Trade to dispense. You have got among the conditions a reference to stopping at passenger stations, but that does not mean the same kind of passenger stations as are mentioned in the first part of the clause, but those other occasional passenger stations (to which I have referred), and with the obligation of stopping there the Board of Trade may dispense.

My Lords, speaking with great respect for the Court of Exchequer, I am bound to say that I cannot persuade myself that that is the proper construction of this section; and even if I had arrived at the conclusion that no other interpretation could be given to this condition but that which holds it to relate to such occasional stations as I have referred to, I should be in great doubt as to whether the result at which the Court of Exchequer arrived was the proper result. But, my Lords, I cannot so read this condition, and I think, if your Lordships will favour me by looking at the different character of these conditions, we shall find a simple, and, as it seems to me, a natural construction, for the section which will reconcile every part of it.

Let us, my Lords, consider *à priori* the character of these conditions before we look at the dispensing clause. The first of these conditions is, that the train shall start at an hour to be fixed by the directors and to be approved of by the Board of Trade. My Lords, it is in the very nature of the case that with that condition there could be no power given to the Board of Trade to dispense. It is the life and soul of the cheap or parliamentary train. If the directors are to be set free from the obligation of having the hour approved of by the Board of Trade, there is no security whatever to the public that the working or poorer classes will have the accommodation which Parliament desired to give them, because the train might be started at an hour which would be altogether unsuitable for them.

Again, let us take the second condition, that the trains shall travel at a rate of speed not less than twelve miles an hour; can it be imagined that with that condition the Board of Trade could have been intended to possess a power to dispense? My Lords, if your Lordships were to arrive at that conclusion, the result would be this, that you would have Parliament declaring that the speed shall not be less than twelve miles an hour, and at the same time saying that the speed may be any other speed which the Board of Trade may appoint; so that in the result it would be just the same as if Parliament had said, without the mention of any speed, the speed shall be that which the Board of Trade may think proper—a conclusion which would be entirely at variance with the character of this enactment, the object of which was to give a certain security to the working classes and the public. Therefore, my Lords, *à priori* I think your Lordships will find a difficulty in implying that it could have been intended to give a power to the Board of Trade to dispense with that second condition.

The third condition is, "Such train shall, if required, take up and set down passengers at every passenger station which it shall pass on the line." My Lords, if that were to be applied to those occasional stations, those stations where there was an obligation to stop by signal, or where there was a stopping for the purpose of a market only, the question would naturally arise, why should there be a power given to the Board of Trade to dispense with the duty of stopping, if required, at those stations more than at any other stations? Why should a working man wanting to go to one of those places where the train stops only on the occasion of a market day, be at the *arbitrium* of the Board of Trade as to whether he had a right to be set down at that station or not? It appears to me, my Lords, that that would be a very strange and forced construction.

Therefore, my Lords, taking those first three conditions, I arrive at the conclusion that it is, *à priori*, in the highest degree improbable that any one of them would have been intended to be left open to be dispensed with by the Board of Trade. With regard to the third condition, it is difficult to suppose that it could be intended to be dispensed with if it refers to those occasional stations which I have mentioned, still more if it refers, as, according to its natural construction, the words would appear to refer, to every passenger station along the line.

Then, my Lords, we pass on to the four other conditions, which appear to me to be of a very different character. Each of the first three conditions commences by the words "Such train"—"Such train shall start"—"Such train shall travel"—"Such train shall, if required, take up and set down." Now we come to what relates more to the conveyance of the passengers in the train. The fourth condition is that the companies shall have carriages protected from the weather; the fifth, that the charge imposed upon the passengers shall not exceed one penny a mile; the sixth, that they shall be allowed personal luggage to a certain amount; and the seventh, that children travelling with adults shall be treated in a particular way. These four conditions are conditions not applying to the train or to the working of the train, but applying to the privileges of the passengers in the train.

With that preface I will ask your Lordships now to pass on to the 8th section, the dispensing section; and I think, after what I have said, its words will appear to be capable of very clear interpretation. It is enacted "that except as to the amount of fare or charge for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore in such case provided, the Lords of the said Committee shall have a discretionary power, upon the application of any railway company, of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such cheap trains as aforesaid," for certain considerations. Now, my Lords, I ask you to observe that the words are not, the Board of Trade shall have power to dispense with any of the conditions hereinbefore mentioned. Why not? If it had been intended to arm the Board of Trade with a dispensing power over all those conditions, that would have been the natural phraseology; the Board of Trade shall have power to dispense on certain terms with any of the conditions hereinbefore mentioned. But those are not the words—the words are, to dispense, not with any of the conditions, but "with any of the conditions hereinbefore required in regard to the conveyance of passengers." There your Lordships have therefore words which make a distinction between the two classes of conditions which are before mentioned. The dispensing power leaves untouched the conditions of entirely a different character which relate to the train, and which must be complied with before it can be called a cheap train at all. The dispensing power takes up the conditions which deal, not with the train, but with the conveyance of passengers, and it singles out from those conditions (that is from the last four conditions) one, the condition with regard to the rate of fare, and it states, putting aside that one condition with regard to the conveyance of passengers, and excepting it from the dispensing power of the Board of Trade, that the Board of Trade may dispense with any other of the conditions in regard to the conveyance of passengers. My Lords, that appears to me to make the language of the whole of the enactment consistent—consistent in point of words as between one section and the other, and consistent with what I think must be taken to be the policy and the object of the Act, namely, to establish a train which shall have certain unchangeable characteristics, but which shall have also certain what I may call accidents as regards the privileges of passengers to be carried by that train. Out of those accidents there is one, the rate of fare, which is not to be changed, but any of the others may be dispensed with or qualified by the Board of Trade.

My Lords, if that is the proper interpretation, as I submit to your Lordships it is, of the Act of Parliament, it disposes of the second question. The Board of Trade has not the power to dispense with the obligation of stopping at the various stations along the line, and these trains which I have described, the faster trains, starting after those which stop at every station, cannot claim to have their traffic exempted from the duty.

I therefore submit to your Lordships that upon both the two points which are now raised by way of appeal, although upon the second point for a reason different from that given in the Court of Exchequer, the decision of the Court of Exchequer is correct, and this appeal ought to be dismissed with costs.

LORD CHELMSFORD:—

My Lords, upon the argument of this appeal only the two questions stated by my noble and learned friend remain for decision. These questions must be determined upon the 6th and 8th sections of the Act, the 7 & 8 Vict. c. 85, commonly called *The Cheap Trains Act.* My noble and learned friend has read both of those sections, and I will not trouble your Lordships again with them.

The Appellants work their system of railways between *Broad Street* and *Poplar*, and between the same terminal station and *Chalk Farm*, and *Kew*, and *Richmond*, by the passengers having in each instance to change the train at *Dalston Junction*, it not appearing that the stoppage at the junction brings down the rate of speed, excluding stoppages, below twelve miles an hour. I agree with the Court of Exchequer that these trains are cheap trains within the meaning of the Act, notwithstanding the removal of the passengers from one train to another at the *Dalston Junction*. It appears that no single cheap train running between *Broad Street* and *Richmond*, or *vice versâ*, stops at every intermediate station between the two terminal stations, although a parliamentary and a non-parliamentary train, corresponding with each other, do by means of this correspondence stop at all the stations.

It is contended on the part of the Crown that these trains are not exempt from duty as "a cheap train" within the definition of such trains in the 6th section, even if they could be regarded as a single train, as they do not travel along the railway from one end to the other, and provide for the conveyance of third-class passengers, at the parliamentary rate, from the terminal and other ordinary passenger stations. But the Appellants say that the Board of Trade, under the discretionary power given by the 8th section of the Act, has dispensed with the condition that the train "shall, if required, take up and set down passengers at every passenger station which it shall pass on the line." It was admitted that such dispensation was, in form, granted, but it was insisted that the Board of Trade had no power to dispense

H. L. (E.)
1876
NORTH LONDON RAILWAY CO. v. ATTORNEY-GENERAL.

with this condition. And this was the opinion of the Court of Exchequer.

Baron *Amphlett*, in delivering judgment, said (1): "With respect to the stopping of trains, we think that the dispensing power is confined to the conditions (expressly so called) at the end of the clause, and does not extend to the requirements in the previous part of the clause, which appear to constitute the essential definition of a cheap train within the meaning of the Act." And then he goes on to explain what he considers to be the effect of the conditions at the end of that clause.

I cannot agree that this condition is *absolutely* beyond the discretionary power of the Board of Trade. By the 6th section of the Act the railway companies must, by means of one train at the least travelling along the railway from one end to the other once at least each day, provide for the conveyance of third-class passengers. This appears to be the primary and paramount object of the Act, and it is an indispensable obligation on the companies. If, therefore, the provision is not complied with, no train upon the railway can have the character of a cheap train, nor consequently can be within the protection of the Act in regard to exemption from duty. An absolute power, therefore, to enable the Board of Trade to dispense with the condition, would strike this essential provision out of the Act. But I think such a dispensing power may be exercised by the Board of Trade in certain circumstances. If a railway company should have one train a day which conformed to all the requirements of the Act, and should be desirous of running other cheap trains on the same lines, which should not be obliged to stop at every station, the Board of Trade may, in my opinion, dispense with the condition as to these which, for distinction sake, I may call additional trains, and by this dispensation may exempt the company from payment of duty. But the Appellants have no cheap train upon the line between *Broad Street* and *Richmond* which stops at all the stations, and therefore, if the Board of Trade dispenses with the condition in favour of this line, the company will not be complying with the positive obligation imposed by the Act, and would be removed altogether from the sphere of its operation.

(1) Law Rep. 9 Ex. 336.

I consider the declaration of the Court of Exchequer to be correct, not for the reasons assigned in the judgment, but upon the grounds I have stated, which have led me to the same conclusion.

Lord Hatherley:—

My Lords, I have come to the same conclusion as my noble and learned friends who have preceded me.

It appears to me that there is one leading guide for us, in the first part of the section establishing the cheap trains, which will carry us safely through the construction of the Act; and I certainly so far adopt the construction which has been put upon it by my noble and learned friend on the woolsack. It is this: the section of the Act which establishes the cheap trains expressly recites the anxiety of Parliament "to secure for the poorer class of travellers the means of travelling by railway at moderate fares, and in carriages in which they may be protected from the weather." That is the general paramount intention of the Act, and the Legislature carries out that intention by enacting in the first clause which establishes that cheap train, that, so long as companies carry any passengers at all upon their lines, they shall provide one such cheap train at the least each way on every week day (with certain exceptions in the Act mentioned) "for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations of the railway." It is clear, therefore, that Parliament intended that there should be one train at the least every day which should take third-class passengers, not only from terminus to terminus, but to and from any station at which any other passenger was taken up or set down. I am not now speaking of special stations, some of which are called signal stations and others market stations, but as regards the ordinary stations along the line of railway, it was enacted that every poor man, coming to any one of those stations where passengers are ordinarily taken up and set down, should be able, at a certain specified time, to be arranged as afterwards provided for, to find his train, and to travel by that train at a certain rate of speed, not less than twelve miles an hour, and at a certain rate of fare specified in the Act, namely, not more than one penny a mile.

Then the Act proceeds to say, providing as it does for the carrying of passengers from the terminal and other ordinary passenger stations, that the trains shall be "under the following conditions":—"Such train shall start at an hour to be from time to time fixed by the directors, subject to the approval" of the Board of Trade. My Lords, I apprehend that that clause was intended to say: You, the poorer class of passengers, shall be carried by one continuous train, not by a series of trains, some of which will start at one hour and some of which will start at another, but which, taken all together, may perhaps stop at all the several passenger stations along the whole course of the line. Instead of that there is to be one train, which is to pass along the line stopping at all the various stations. In saying "one train," I do not refer to that which has been conceded by the Crown, and I apprehend rightly conceded, namely, that a passenger who started by an earlier train, was dropped at a station and then overtaken by a later train, and changed from one train into another, should not, merely from that fact, be considered to be travelling by the second train. I do not apprehend that that would be so, any more than if he were to be put out of one carriage in a train into another carriage he could be said to have changed his position in this respect. But what is meant is this: There shall be a through train running from end to end of the line, which shall perform the journey at the average speed of twelve miles an hour, and which shall be prepared to take up any passenger presenting himself at any station on the line; and it shall be a train of which the hour for starting shall be fixed with the approval of the Board of Trade, and which hour, when once fixed, can only be changed subject to the same approval. It seems to me to be an essential condition which cannot be dispensed with, that this shall be a train at which every poor man, who is desirous of travelling by it, shall be able to ascertain the hour of departure, whether from the terminal station or from any other station, according to the time that the train shall be occupied in running through the several stations on the route.

My Lords, having secured the train for the passenger from the terminus, and having secured the time for starting, and the same for a series of passengers all along the line of route, at this cheap rate, the next condition the Legislature lays down is that the train shall travel at an average rate of twelve miles an hour. Then, thirdly, we have the condition that this same train, which the Legislature is talking of all through, is, "if required, to take up and set down passengers at every passenger station which it shall pass on the line." Now afterwards there comes this dispensing power in the Board of Trade which is in question in the case before us, and the argument has been that the Board of Trade has a discretionary power of dispensing with that condition of the train stopping at every passenger station, because it is said that that which is mentioned in the previous clause comes in as one of the conditions, and as being one of such conditions, it is within the power of the Board of Trade to dispense with it. But, my Lords, observe what the argument of the Appellants must amount to. There is nothing in the Act at all which limits this power of the Board of Trade, as to dispensing with conditions, to any one train in particular or to any class of trains. If it is good at all, it must be good for all; and if it is good for all, then the Board of Trade would have the power of saying as to any train: Although the Legislature has said, You shall have at least one train a day, and at least one train a day performing all those conditions which are required as to the starting of the train, as to the rate of travelling, and as to the number of stations it is to stop at, we (the Lords of the Committee) will strike out of this number certain stations. What will be the consequence? The consequence will be that there will be a certain number of the poorer class of people, living in the neighbourhood of the stations struck out by the Board of Trade, who will not have the advantage of being conveyed as all their richer neighbours will, who can afford to pay a higher price than one penny a mile. When these poor people living near the stations which have been struck out wish to travel by a cheap train, they will be told by the railway company, The Board of Trade has sanctioned our leaving you out, as to certain stations, all along the course of the line.

It was said that, according to the provisions of the dispensing clause, bargains securing other advantages might be made by the Board of Trade which would be for the benefit of the poorer class of passengers, it being in consideration of benefits as regards speed, covering from the weather, seats, or other matters of convenience to the passengers that the dispensing power is to be exercised.

But, my Lords, it is obviously impossible that the striking out of the condition of stopping at every station where the trains ordinarily stop to take up and set down passengers, can be in any shape or way for the benefit of those persons living near those stations who may be desirous of being conveyed at the rate of one penny a mile. And why? Because they never can, so long as the railway lasts, be carried at the rate of one penny a mile, for their stations have been struck out. How can any arrangement to be made by the Board of Trade, possibly be conceived, which would be a benefit to those persons who are not to be admitted to the benefit of cheap trains at all? Parliament having secured the cheap train, having taken great care that the rate of one penny a mile should not be exceeded, we should, according to what is now contended for, have to hold that it had by a subsequent clause, said, with reference to a certain number of intervening stations on the line: We have given power to the Board of Trade to overrule all that we have done by the previous clause, and to say that there are certain persons residing along the line who shall have no benefit from the cheap trains at all.

My Lords, I apprehend that any construction which led your Lordships to such a result as that would be a most improper construction of the Act of Parliament, unless we were driven to it by an impossibility of finding any other construction at all for those words which deal with the discretionary power of the Board of Trade. My noble and learned friend the Lord Chancellor has pointed out that those first three "conditions," as they are called, all relate to the train. The train is described as a cheap train, it is enacted that one such train, at least, every day is to be provided; and then the Legislature, fixing its mind on that one single train, with that before its view at the moment, calling it "such train," in the singular throughout, says, "*such* train" as this shall start at an hour to be from time to time fixed by the directors, subject to the approval of the Board of Trade; it says "*such* train" shall travel at an average speed of not less than twelve miles an hour, and it says "*such* train" shall, if required, take up and set down passengers at every passenger station which it shall pass on the line. And then it proceeds to lay down the remaining conditions,

H. L. (E.)
1876
NORTH LONDON RAILWAY CO. v. ATTORNEY-GENERAL.

in order to make provision for the comfort and accommodation of the passengers who will be conveyed in that train. By means of the first three conditions, if I may so put it, it seats them in the train and it tells them what sort of a train they are seated in; and then the other four conditions provide for their comfort. The first says that they shall have seats, and that the carriages shall be protected from the weather. The second provides that the charge which may be made for each passenger shall not exceed one penny a mile, and that is specially excepted from the dispensing power; it would have fallen within the dispensing power unless it had been specially excepted from that power. Then there is a provision with respect to carrying a certain quantity of luggage, and a provision with respect to children, and the rates at which they are to be conveyed.

Now, my Lords, although I do not conceal from myself that the wording of this Act is not so clear and precise as one would desire, I think still one may arrive at a sound conclusion upon the whole Act, if we do not adopt the conclusion which, not being confined to any one train in particular, would lead us to say that any station might be excluded from the benefit of this arrangement as to cheap trains. If we do not adopt that conclusion, which, I say it with great respect to the Court of Exchequer, leans on so very slight a distinction as that which is drawn between the signal and the market stations on the one hand, and the general stations on the railway on the other; but if we adopt the conclusion of saying that this dispensing power with regard to the conveyance of passengers by such cheap trains, may be well and properly applied in the way in which the Lord Chancellor has pointed out, to the four concluding conditions in the first enacting clause with regard to cheap trains, leaving the other three conditions, by which the train is started and set in motion, not to be affected by those words of dispensing, which are to be applied only to the conveyance of passengers by those cheap trains;—I think, taking that as our guide, we arrive at a much more sound and reasonable construction of the whole Act, according to its true meaning and intent, than by any other.

It appears to me, my Lords, although, as I said before, I do not feel free from some amount of difficulty, that the result arrived at by the Court of Exchequer was the right one, and that the appeal must be dismissed.

Lord O'Hagan:—

My Lords, the accepted rulings of the Court of Exchequer and the mutual concessions of counsel at the Bar, have reduced the questions in controversy in this case to the smallest possible compass, and I should not add a word to the full statements of fact and law which have already been made, but for my wish to mention that whilst in the result I concur with my noble and learned friend on the woolsack, I have had considerable doubt in the progress of the argument; and although I adopt the conclusion of the Court below, I have insuperable difficulty in approving some of the reasons on which it was founded.

It has seemed to me not very clear, regard being had to the words "hereinbefore required," which are large enough to reach all antecedent conditions, that the word "conditions" in the 8th section of 7 & 8 Vict. c. 85, may not be applied to the provisions in the body of the 6th section, some of which are in their nature "conditions" as well as the seven clauses specifically so denominated at the close of it. And I see no sufficient justification for limiting the operation of the words "every passenger station" in the third of those clauses to the extent or in the manner indicated by Baron *Amphlett.* But on the first of these points the Appellants have not relied on the view which had occurred to me, and public policy, if the matter be doubtful, strongly counsels its rejection. If the opposite view, which was tacitly or expressly accepted by both parties, be the true one, the construction of the third condition becomes comparatively unimportant, as the substantial object of it will be secured at all events.

Like my noble and learned friend opposite (Lord *Hatherley*), I am not quite satisfied with any view presented to us of the meaning of these clauses, which are difficult and obscure; but I prefer that which will best carry into effect the manifest purpose of the Legislature. Assuming, therefore, that the body of the 6th section is not affected by the dispensing clause, I am prepared to hold, with my noble and learned friends, that the power given by

H. L. (E.)
1876
North London Railway Co.
v.
Attorney-General.

that clause does not enable the Board of Trade to nullify—as the dispensation contended for might, certainly, nullify—the essential provisions devised for the protection and advantage of the poorer classes, who, if the Appellants' contention should prevail, might be deprived of the cheap and facile means of locomotion to which the stringent terms of the statute had entitled them.

I shall not waste time in repeating the arguments, already lucidly laid before the House, which have led me to support the proposal of the Lord Chancellor.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 22nd Feb. 1876.

Solicitor for Appellants: *Paine, Layton, & Cooper.*
Solicitor for Respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
Feb. 29.

MORRIS ROBERT SYERS . . . . . . APPELLANT;

AND

DANIEL BACKHOUSE SYERS AND EDWARD LOUIS PARAIRE . . . . . RESPONDENTS;

7 Ch D 523.
18 Ch D 702

Loan—Partnership—28 & 29 *Vict.* c. 86—*Sale of Business.*

A., in June 1869, borrowed £250 from *B.*, and, at the time, signed a paper in the following words:—"In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the *Oxford Music Hall and Tavern*, to be drawn up under the *Limited Partnership Act* of the 28 & 29 Vict. c. 86, called an 'Act to amend the Law of Partnership:'"—

Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which *A.* promised to repay *B.* on the 1st of September, 1872, the principal sum together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to *B.* on that day. This letter was followed by a tender, which was not accepted.

On a Bill filed by *B.* for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, *A.* put in an Answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872:—

Held, that it had not been determined by that letter, but that the Answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the Answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day.

Per The Lord Chancellor (Lord *Cairns*):—A co-partnership in profits is a co-partnership in the assets by which the profits are made.

Per Lord Chelmsford—In order to bring a case within the 28 & 29 Vict. c. 86, there must be a contract in writing, and the document must shew on the face of it that the transaction is one of loan: and parol testimony to vary it is inadmissible.

In a case like the present the Court of Chancery has power, in its discretion, to grant either a sale of the undertaking as a going concern, or a proposal for a purchase (by the holder of the seven-eighth share) of the one-eighth share mentioned in the agreement. The House, under the circumstances here, adopted the latter course.

The decrees of the Court below varied accordingly, and the cause was remitted to be dealt with according to the Order of the House.

THIS was an appeal against an order of the Lords Justices which had varied a previous order of Vice-Chancellor *Bacon.*

The Appellant was the lessee of the music hall in *Oxford Street* known as "*The Oxford*," and of "*The Boar and Castle*" tavern adjoining. The music hall was established in 1869. Mr. *Paraire* was a receiver appointed under certain deeds, which it is not necessary to consider. Shortly before the actual opening, the Appellant, being in want of a sum of ready money, applied to his brother, *Daniel B. Syers*, the Respondent, for an advance of £250. That Respondent drew up a paper which was, in form, addressed to himself, and was duly signed by the Appellant. It was dated the 8th of June, 1869, and was in the following terms:—"In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the '*Oxford Music Hall and Tavern*,' to be drawn up under the *Limited Partnership Act* of 28 & 29 Vict. c. 86, called an 'An Act to amend the Law of Partnership.'" The money was advanced, and the speculation became successful.

The Respondent *Syers* afterwards claimed to have a deed of partnership executed, and a deed was drawn up on his behalf, but the Appellant refused to execute it. On the 20th of August, 1872, the Appellant wrote to his brother a letter in which he said: "I now write to say I will repay you the Two Hundred and Fifty Pounds which you lent me previous to my opening the '*Oxford*,' on the 1st of September next, and will, at once, have estimated the profits of the '*Oxford*' up to that date, and, when ascertained, if any, will pay to you that proportion to which you are entitled from the document which I signed when you lent me the money, and so put an end to the transaction and all unpleasantness between us resulting from it.—Yours, affectionately, *M. R. Syers*."

In accordance with this letter (and before the day named in it), a tender was made of the £250, and a promise to have the accounts at once made up was given, but the Respondent refused to receive the money, and on the 31st of August filed his bill against the Appellant, claiming in substance to be a partner with the Appellant in the undertaking, and praying for specific performance of the agreement of the 8th of June, 1869, and for an account and for farther relief.

On the 21st of February, 1873, the Appellant put in his answer insisting that the money was advanced by way of loan, and submitting to repay it to the Respondent, and to account for and pay to him in lieu of interest thereon one-eighth share of the profits of the undertaking up to the time when repayment was tendered, and submitting farther, that even if the agreement of the 8th of June, 1869, had been (which he denied) an agreement under which *Daniel Backhouse Syers* was to become a partner with him, *Morris Robert Syers*, in the said undertaking, it was not one of which the Court could enforce specific performance; and farther, that even in that case it constituted at the utmost a partnership only in the profits of the business, and at will, which was effectually determined on the 1st of September by the notice of the 20th of August.

In May, 1873, the Respondent amended his bill, and made Mr. *Paraire* a Defendant, and prayed that he might be restrained from paying to the Appellant, and that the Appellant might be restrained from receiving, any sums in respect of the profits of the undertaking.

The sum of £995 had been paid into Court under an order of the Court made without prejudice in the cause, and by a subsequent order the Appellant was ordered to pay from time to time one eighth of the accruing profits of the undertaking.

The cause was heard before Vice-Chancellor *Bacon,* who, on the 5th of March, 1875, made a decree declaring that the Plaintiff, *D. B. Syers,* was, under the agreement of June, 1869, "a partner of the Defendant *Morris Robert Syers* to the extent of one-eighth of the profits of the music hall and tavern;" and accounts were ordered with costs as to both *D. B. Syers* and Mr. *Paraire.*

On appeal, the Lord Justices varied the decree by striking out the words "a partner of the Defendant *Morris Robert Syers* to the extent of," and inserting in lieu thereof the word "entitled" and in other respects affirmed the decree.

This appeal was then brought.

Mr. *Southgate,* Q.C., and Mr. *W. Pearson,* Q.C. (Mr. *H. C. Phear* was with them), for the Appellant:—

The letter of June, 1869, did not constitute, nor was intended to constitute, a partnership. The word "partnership" was used to describe a title, not to take the profits, but to take a sum which was to be calculated at one-eighth part of what those profits might be. Of course it was expected that that sort of arrangement would give the Respondent more than he would obtain by a payment of common interest on the sum advanced. The Respondent himself shewed that he did not mean to engage in a partnership; for, though he used that word, he took care to repudiate its effects by his express reference to what he called the *Limited Partnership Act,* which, in fact, was an Act that was intended to protect persons who received interest on money advanced to a business, or already invested in it, from being thereby made liable as partners. This transaction was merely that of a loan, with the advantage secured of getting a greater income from it than interest on a loan would give, and yet without incurring any partnership liability. If there was any pretence to give it the character of a partnership, it could only be a partnership at will, and that had been dissolved by the notice contained in the letter of August, 1872. The Appellant had tendered the payment of all that could really be said to be due up to the 1st of September, 1872, and the bill ought to have been dismissed. The terms of the document are inconsistent and incoherent, and specific performance of the terms of such a paper cannot be directed. The question of the real intention of the parties can be tried at law.

Mr. *Cotton*, Q.C., and Mr. *T. A. Roberts*, for the Respondent, relied on the words of the agreement of June, 1869, which the Appellant had deliberately signed, and which constituted a partnership as to the one-eighth share of the profits and assets. Such a partnership could only be dissolved by mutual arrangement, or there might be an order for the sale of the concern.

Mr. *Caldecott* appeared for Mr. *Paraire*, and asked for costs.

Mr. *Southgate* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, there is no question that the dealing between the two litigants here—two brothers—has been of a character which has caused considerable difficulty as to what may be exactly the definition of their relative rights. When the case came before the Vice-Chancellor, he made a decree which, as far as the wording of the decree went, declared that the brothers were partners, because, by it, the Court declared that "the Plaintiff was, under the agreement" made between them in 1869, "in the Plaintiff's bill mentioned, a partner of the Defendant *Morris*" "to the extent of one-eighth of the profits of the music hall." But then, when the Vice-Chancellor, at the close of his judgment, was asked by the counsel this question, "Does your Honour treat it as a partnership dissolved?" the Vice-Chancellor answered, "No; I treat it as a purchase." When your Lordships refer back, however, to the decree of the Vice-Chancellor, you find that, contrary to what is usual in such cases, there is no declaration as to what is the limit or duration of the partnership, or as to whether it is a partnership at will; nor, on the other hand, is there any order for the dissolution of the partnership; but there is this, which is certainly not very usual, an order for the accounts, which must be accounts of the profits of the partnership, up to the time of the decree apparently, and an order for payment, without saying what was to be done for the future—whether the parties were to lapse again into a state of controversy and dispute, or whether they were to be declared to be connected in partnership for any particular length of time.

Then, my Lords, when the question came by appeal before the Lords Justices, their Lordships seem to have been pressed with this difficulty. They struck out from the decree all reference to a partnership, and, as I read their opinions, they do not proceed upon the footing of a partnership. Lord Justice *James* certainly used the expression, a "*quasi* partnership," which would seem rather to imply that there was not, at all events, a real partnership; but Lord Justice *Mellish* appears not to have entertained the idea of a partnership, or a *quasi* partnership, at all; but, on the contrary, to think that the agreement might mean an agreement under the statute of 28 & 29 Vict. c. 86, which is a statute, as your Lordships are aware, which negatives the idea of the existence of a partnership. Accordingly, the decree, as altered by the Lords Justices, declared, not that the Plaintiff and the Defendant were partners, but that the Plaintiff was, under the agreement of the 8th of June, 1869, entitled to "one-eighth of the profits of the music hall called '*The Oxford*,' and tavern called '*The Boar and Castle*,' in the bill mentioned."

My Lords, whatever conclusion your Lordships may arrive at upon the subject, I apprehend that it is impossible that the case can be left in the state in which it is brought up to your Lordships' House. You will, I think, have to determine whether, on the one hand, there is a partnership between these persons, or, on the other hand, if there is not a partnership, whether there has been simply a contract of loan which either ranges itself under the provisions of the statute to which I have referred, or is a contract of loan which, however open to objection by an outside creditor, is, at all events, a valid contract of loan between these parties.

My Lords, fortunately the determination of this question has not to be sought for through any number of documents. It depends upon the construction of one document alone, the letter, to which I have already referred, of the 8th of June, 1869; and to the construction of that document I now invite your Lordships' attention. That document is addressed by the Appellant to the Respondent; it passed between them just before the tavern or place of entertainment in question in *Oxford Street* was opened, and it was given by the Appellant to the Respondent on the occasion of the Respondent furnishing him with a sum of £250 for the purpose of starting that speculation. It runs thus:—[His Lordship read it, see *ante*, p. 175.]

Now, my Lords, the first observation that I make upon this letter is this: whether your Lordships take it to be a letter pointing to a partnership, or a letter pointing to a loan; neither in the one case nor in the other is there any term specified as the duration of the partnership, or the loan, as the case may be. If it is a partnership, it is a partnership without a term, that is to say, a partnership at will. If it is a loan, it is a loan without any term being specified for its duration, that is to say, it is a loan which, on the one hand, may be called in at any time, and, on the other hand, may be paid off without any notice.

My Lords, I asked one of the learned counsel who argued the case at your Lordships' Bar, whether there were any words which they could point to, which stipulated for any particular duration of the loan, or of the partnership, as the case might be. Mr. *Cotton* admitted that there were no such words, but he said that the Court below had been struck by the great improbability that any person would have advanced money to a concern of this kind to be recompensed only by profits, if before any profits were earned he could be paid off without any interest. My Lords, it is dangerous, I think, to speculate upon what we may suppose would have been the intention of the parties; but even upon that suggestion I might add a counter-suggestion, that it might well be in the mind of the person advancing the money, that he did not desire to fetter himself as to the right to call in his money, because the business might turn out to be an unprofitable one, and he might desire, in that event, before farther loss was incurred, to get back the capital of the money he had advanced, intact; and he could not be free to recall this capital, his money, unless, on the other hand, the person to whom the money was paid was free to pay him off at any time. Therefore I submit to your Lordships that we must not indulge in any speculation or conjecture as to what the parties might have stipulated for. We must look at what they have stipulated for, and we find that they have not stipulated for any specific duration of this contract, whatever its nature may be.

Then, my Lords, the only question is, what is the contract; is it partnership, or is it loan? There again, the only difference between those two constructions is this: if it is loan, the person advancing the money, the Plaintiff in the case, the Respondent at your Lordships' Bar, is entitled to have his capital back, and his aliquot share of the profits made in the business up to the time of the repayment. On the other hand, if it is partnership, he will be entitled, if the assets are sufficient, not merely to be repaid the capital sum he has advanced and his aliquot share of the profits; but he will be entitled in some way to ascertain with regard to the assets of the partnership, whether they are greater now in value than they were at the time the business commenced, in other words, whether, if this business were to be sold as a going concern, after paying all charges upon it, and all capital brought into it, there will be a surplus to one-eighth of which he, as a partner, will be entitled.

Now, my Lords, I repeat, to which category, of partnership, or of loan, is this agreement to be assigned? Your Lordships have, at the outset, these very strong and distinct words, which it certainly is difficult to get over, "I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the *Oxford Music Hall.*" The expression is clear—it is to be a "co-partnership." But then it is said, "But it is only to be a co-partnership in profits." A co-partnership in profits, as we all know, is a co-partnership in those assets by which the profits are made and produced. If, therefore, your Lordships are to take the first part of this letter as containing the governing idea, it is a letter stipulating for a co-partnership. But then the second part of the letter bears in a different direction. The deed of co-partnership is "to be drawn up under the *Limited Partnership Act* of 28 & 29 Vict. c. 86, called "An Act to amend the Law of Partnership." Now if your Lordships take this latter clause of the sentence, not regarding the first clause, you arrive at the conclusion that the deed is to be drawn up in conformity with that Act of Parliament. But that Act of Parliament is an Act which does not contemplate, but rather negatives, the idea of a partnership, and dwells upon the theory, not of a partnership, but of a loan. Therefore if you were to take the latter part of this sentence alone, it would lead you to a conclusion in favour of a loan and not of a partnership.

But, my Lords, is there no way by which the whole of the letter may be reconciled and effect given, not only to the first, but to the second part of it? Undoubtedly the letter is inartificial in its terms, undoubtedly it has been drawn up by some person who, clearly, has not had a technical knowledge of law and of legal terms. But what your Lordships find clear is this: there is to be a deed of co-partnership, and that deed is to be drawn up in some way that will carry into it the governing or leading idea of the *Limited Partnership Act*. Now the *Limited Partnership Act* was an Act the essence of which was that it gave a protection against outside creditors. It provided that if the parties between themselves stipulated that there should be an interest in profits without any interest in loss—without any complete community between profits and loss—that alone should not make the person receiving profits in that way liable to outside creditors. My Lords, I conceive that the construction which must be given to this letter is, that the writer of it and the person to whom it was addressed, had fastened their minds upon that idea. They wished that the Respondent should have profits in the concern but should not bear loss, and in that way the idea of the statute would have effect given to it; but with that they wished that the deed should be "a deed of co-partnership;" a deed of co-partnership, therefore, in which the stipulation in substance would be that the owner of the one-eighth of the profits was to have that one-eighth without any liability to be subject to the losses of the concern.

My Lords, in that way, effect is given to every word of the letter, and I cannot myself help thinking that that is really what the parties intended. My Lords, if that is so, there is a partnership at will, a partnership entitling the Respondent to one-eighth of the profits of the concern, and, like any other partner, to have it known what his share of the assets of the concern may be.

My Lords, has that partnership at will been terminated? It appears to me that it clearly was terminated when the answer was put in, in this suit. That answer indeed attempts to say that it was terminated at an earlier period—that it was terminated by a letter of the 20th of August, 1872. But when your Lordships look at that letter you find that it is a letter going entirely upon the theory of loan; offering to repay the money as a loan with a share of profits in lieu of interest, not taking any notice of a partnership or of any interest in assets, but rather bearing in opposition to the idea of a partnership. I cannot see how that letter could of itself operate as a dissolution of a partnership which was repudiated at that time. But the answer appears to me to stand upon a very different footing. I will not read the answer, for your Lordships have heard it read, but what it says in substance is this: "I, the Defendant, as a matter of law dispute that there is any partnership. I say that there is a loan and nothing but a loan; but if there is a partnership—if that point is decided against me, and if this, which is a question of law, is determined in favour of my opponent, if the Court says there is a partnership—then I submit that it was effectually determined on the 1st of September by the letter" (which I before mentioned) "of the 20th of August." But if it was not terminated by that letter, there is in this answer the clearest intimation that the will of the partner, at whose will the partnership was constituted, is against any continuance of the partnership; and whether that will is expressed by a letter or by an answer, or in any other way, is immaterial. There is no technicality, no magic as to the mode of expression. There is here the clearest intimation given by the answer that if there is a partnership, the Defendant wishes it no longer to continue.

Therefore, my Lords, the result, in my opinion, is, that there was a partnership, but that that partnership was terminated at the time of putting in the answer. My Lords, it is very true, as was said at the Bar, that on dissolving a partnership of this kind the ordinary course would be for the Court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the Judge in Chambers. My Lords, those provisions are moulded in every case by the Court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the Respondent, it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the Court would have thought it right to authorize the owner of seven-eighths of the concern to lay proposals for a purchase before the Judge in Chambers. I am about to submit to your Lordships a provision which will, I think, in another way, arrive in substance at the same end.

If your Lordships agree with me, you will, in the first place, reverse the decree of the Vice-Chancellor, and of the Lords Justices, and substitute the decree I am about to read. But before reading that decree I ought to mention that the costs of the Respondent *Paraire* ought, I think, to be disposed of, and that the Respondent *D. B. Syers*, who appears to have brought him here unnecessarily, ought to pay his costs.

My Lords, I would propose to your Lordships to declare that under the terms of the letter of the 8th of June, 1869, the Respondent became entitled, as a partner with the Appellant, to one-eighth share of the profits of the *Oxford Music Hall* and tavern in the pleadings mentioned; and that the partnership between them was dissolved at and from the 21st of February, 1873 (the time of filing the answer of the Appellant), and that the sum of £250 mentioned in the said letter, is to be taken as capital brought by the Respondent into the partnership without interest. Then there will be a direction to take an account of the receipts and payments of and respecting the said music hall and tavern, and of the gains and profits thereof, from the 8th of June, 1869, down to the 21st of February, 1873, in order to ascertain the Plaintiff's one-eighth part thereof. Then an inquiry what sum would represent the Plaintiff's one-eighth share in the value of the said music hall and tavern, if sold as a going concern, after deducting all charges thereon and all liabilities of the business. Then on payment by the Defendant to the Plaintiff, within a time to be fixed by the Judge in Chambers, of the £250, and the sums coming to him under those heads, Nos. 1 and 2, which I have read, no farther accounts, but the Defendant to pay the costs up to the hearing. No other costs up to this time. The costs of the accounts to be in the discretion of the Judge in Chambers. Then, if the payments which I have specified are not made by the Defendant, direct a sale of the hall and tavern as a going concern, and a division of the assets of the partnership in the usual way, with liberty to apply in Chambers as to the form of such direction.

LORD CHELMSFORD :—

My Lords, this case must be determined entirely upon the written contract between the parties. That contract is, "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the *Oxford Music Hall and Tavern.*" So far the contract is perfectly clear in its terms, but then it goes on to provide that the deed, that is, the deed of co-partnership, is "to be drawn up under the *Limited Partnership Act.*" This reference to the *Limited Partnership Act* shews that the parties have misunderstood its provisions. They appear to have thought that there might be a deed of co-partnership in terms, but, if expressed to be drawn up under the *Limited Partnership Act,* that the person advancing the money would not be completely a partner, nor be responsible as such.

But in order to bring a case within the Act there must be a contract in writing; and according to my reading of the Act the contract must, on the face of it, shew that the transaction is a loan. The 1st section of the Act is in these terms: "The advance of money by way of loan to a person engaged in, or about to engage in, any trade or undertaking upon a contract in writing with such person that the lender" "shall receive a share of the profits," "shall not of itself constitute the lender a partner" "or render him responsible as such." Now, this contract, so far from stating that the agreement of the parties was for a loan, states the direct contrary. Its terms are "in consideration of the sum of £250 this day," not *lent,* but "*paid,* to me, I undertake to execute a deed of *co-partnership.*" And the deed of co-partnership is "to be drawn up under the *Limited Partnership Act.*" But such a deed could not be so drawn, because the Act requires a contract in writing upon the footing of a loan, and there is no such contract between the parties. And parol testimony to vary the terms of a written instrument, where by Act of Parliament it must be in writing, is inadmissible.

Therefore, my Lords, upon these short grounds, I agree entirely with my noble and learned friend as to the determination of this appeal, and as to the declarations which he has proposed.

LORD HATHERLEY:—

My Lords, I entirely concur.

There is no doubt some difficulty in giving a precise effect to every word contained in this contract; but, in the first place, I have to remark upon it, that such a difficulty will not relieve any tribunal from the duty, if possible, to give a construction, and, as far as the words will admit of it, a reasonable and coherent construction to every part of the instrument. As regards a part of the case which has been argued before us, namely, that the instrument is so incoherent that the parties must be left at law to make the best of it, I only observe that that is the last resource of any Court before which a question of construction is raised, and that the first duty of the Court is to give a reasonable construction if possible.

Farther than that, it was said that, this being a case of specific performance, it would be sufficient for those who resisted that performance to say that the instrument itself was doubtful, and that one understood it in one sense and the other party understood it in another and a different sense, and therefore it is not to be performed. It is a good defence to a bill for specific performance to say that there was a mistake in fact on the part of either of the persons who engaged in the contract, which renders it inequitable that, against such a mistake in fact, a construction should be forced upon him, which he was unprepared for, in consequence of having been misled (not necessarily by his opponent) as to the circumstances and facts of the case. But there is nothing of that kind here.

The whole question in the present case turns upon the construction of the document. Both sides agree that it was written out deliberately, and that at that time no other construction was put upon it than such as it might bear when properly construed. Therefore one approaches the instrument with a desire to make it intelligible and consistent as far as is possible; and it seems to me that the first part of it is intelligible beyond all dispute. It begins thus: "In consideration of the sum of £250 this day paid to me." This does not necessarily indicate a purchase in itself, because a sum may be paid either in the way of purchase or of loan; and if it had rested there the case might have been left *in dubio*. But we must read farther: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the *Oxford Music Hall*." Nothing, of course, can be clearer than that contract, as far as it has yet proceeded. It is an undertaking to execute a deed of co-partnership of one-eighth share, in other words to sell that one-eighth share (that is the only meaning that can be attributed to the words, as far as they are here expressed), in this business which I have in hand, and am about to undertake. I introduce these last words from what is before us *déhors* the instrument, shewing that the business was at that time about to be undertaken and commenced.

Then it proceeds to mention that which has occasioned all the difficulty in the case, and that is that this deed is "to be drawn up under the *Limited Partnership Act* of 28 & 29 Vict. c. 86, called 'An Act to amend the Law of Partnership.'" That undoubtedly cannot possibly be done literally, because, as has been pointed out by my noble and learned friend who has last addressed your Lordships, that Act would point to something entirely different, as between the parties to the instruments which are sanctioned by that Act, namely, the express case of loans, whether loans upon which interest is to be paid, or loans upon which in lieu of interest any specified share of the profits of the partnership is given—a circumstance which it is said expressly is not, in itself, to constitute a partnership.

But I think that a reasonable construction to be put upon that phraseology, as connected with the clear and indisputable phraseology in the first portion of the agreement, with reference to selling the eighth share, is that which has been put upon it by my noble and learned friend on the woolsack, namely, that, *inter se*, the intention of the parties was that the person who became entitled to this one-eighth share should not be, on that account, liable to losses as between the two parties to the engagement. They could not bind the external world or creditors, no doubt, by any such arrangement between themselves, but, as between themselves, having observed that there were cases in which, under this Act of Parliament, deeds might be framed whereby those engaging in a transaction might stipulate that the profits of the concern should be divided between them, whilst one of the parties should not be liable to loss,—having seen that that arrangement might be entered into when the deed was framed with proper care, and with due reference to the Act of Parliament, we may take it that, as far as they comprehend the Act, the intention of the parties was to avail themselves of that mode of proceeding. If they could have done so, they would doubtless have wished to extend it to the external world, but that was impossible. As between themselves, at least, their intention was that one party should have one-eighth of the profits of the concern, without being liable to losses to happen in respect of the partnership. I mean one-eighth of the profits, of course, after the balance of profits and loss had been struck.

My Lords, the defect, as it appears to me, in each of the decrees is this. Having now read through the contract, whether it be a contract of loan, or whether it be a contract of partnership, we find that there is nothing whatever to limit the duration of the loan, nothing whatever to express the duration of the partnership. Now according to the general law in such cases, no term being expressed, either side would be at liberty, if it was a loan by payment, if it was a partnership by notice of dissolution, to put an end to this engagement. And those arguments which are adduced to your Lordships by Mr. *Cotton* to satisfy us, and which seem to have satisfied the Courts below, that such could not be the construction of the agreement—because, if it were a temporary arrangement, the money might be called back the next day, or the partnership might be broken up the next day—these arguments really seem to me to have no bearing upon the case whatever, because all parties entering into a contract of partnership (the case is one which is continually occurring before the Courts) have, in the first instance, the fullest confidence in each other, and consequently many things are often unprovided for, which, on more mature reflection, and, perhaps, on the advice of a professional man, would otherwise have been provided for in the contract. Frequently in very large concerns, I believe I may say in some of the very largest concerns in the city of *London*, partnerships have been entered into without any instrument whatever, and have gone on for years and years, although they might have been determined after the first year of the partnership, because there was no fixed period to which it was limited.

Now the present case cannot be compared to the case of an engagement for a particular adventure, whether an adventure for trading in cotton, or for trading in iron, or the like. Such an adventure is concluded after a certain time in the nature of things—it is wound up, and the profits are ascertained. But with regard to the concern we are discussing—the management of a music hall—there is no such natural period for its termination. The partnership holds leasehold premises for a long period—thirty-five years, but it is agreed by Mr. *Cotton* that the Plaintiff had no means of compelling the Defendant to carry on the business for thirty-five years, or any other period of time. If that had been possible, he might, on the same principle, supposing the partnership had owned a fee simple, have obliged him, and those who came after him, to carry it on for ever. Of course nothing of the kind could be done—no person could contemplate anything so unreasonable. The fact of the contracting parties having omitted to specify any time for the duration of the partnership would only have this one result—the partnership would go on probably for a certain length of time, but not perhaps so long as if the parties had thought of stipulating a time,—which they have not done in the present case. However, it has gone on for these three or four years. Now the time has come when the parties can no longer agree, and it is necessary to put an end to it; and the defect of the decrees which we have before us—the decree of the Vice-Chancellor and the decree of the Lords Justices (I say it with the very greatest respect for those authorities)—is, that they indicate no term whatever to the arrangement, whether it be loan or partnership.

And, what I venture to say is a very unusual and extraordinary decree is granted, for it orders certain accounts between the parties to ascertain the profits and loss, without saying anything as to what is to be done for the future, without terminating the contract between the parties. I remember in old times it was held by Sir *John Leach* that a bill was demurrable which prayed for accounts of a partnership, without praying for a dissolution of it. That has been modified in some recent cases, but the principle was, that when a partnership deed not specifying a term is brought before the Court,—unless there were some very unusual circumstance in the case, or some unusual contracts had been entered into,—in the ordinary state of partnership affairs the accounts should be wound up and the transaction settled once for all. In winding up a transaction of this kind with regard to ascertaining profits, I apprehend that, whichever way the decision had gone, it would have been necessary to do that which my noble and learned friend on the woolsack has indicated; because when you come to terminate a matter of this kind, the case is different from what has been going on during previous years. During previous years the person who was entitled to a one-eighth share has been content, and must perforce have been content, to take the profits as settled by those who are engaged in carrying on the business of the partnership, whether that amount would really prove to be the full amount of the profits or not, the profits in each year depending, of course, upon the stocktaking and the value of the stock taken in each year. But when you wish to bring the matter to a termination, there is no reason why the person wishing to have his share of the profits should be content with taking the amount of profits in that way, as it may have been declared by the managing partner for himself and the others who have been engaged with him in the partnership. The Plaintiff says: "I want now to have the whole thing wound up, and to ascertain what at this moment is the total amount of the profits made by this concern since I became engaged with you in it." In order to do that, whichever view is taken, whether it was a loan to be compensated by a one-eighth share of the profits, or a partnership, the profits of which were to be divided, in either case the valuation proposed is necessary.

I think, my Lords, that the valuation proposed is all that under the circumstances of this case the Plaintiff is entitled to ask. I do not think he is entitled, under the engagement he has entered into, to ask for a sale of the concern, regard being had to the amount of his interest in it and to the nature and character of that concern, which of course the Court of Chancery is always bound to look to, and the injury that might result from having a sale of a business of such a description as this is. Under these circumstances it is quite competent for the Court to direct such a course of proceeding as has been sketched out by my noble and learned friend in the decree which is proposed now to be made by your Lordships; and I concur in that decree, both in the shape in which it is drawn up, and in the principles which my noble and learned friend on the woolsack has enunciated as the grounds of his decision.

LORD O'HAGAN:—

My Lords, I concur entirely in the conclusion at which my noble and learned friends have arrived, and I do not propose to occupy your Lordships' time unnecessarily by going over the reasons which seem to me to justify that conclusion. I will, however, say that I had in the course of the argument considerable doubt, for a time, whether, on the grounds of the indefiniteness of the agreement in this case, and of some indications of mutual mistake between the parties to it, which were forcibly pressed on our attention by Mr. *Pearson*, it is properly the subject of intervention by a Court of Equity. But I agree with my noble and learned friend who last addressed your Lordships that it behoves us, if possible, to deal with the matter effectively, and prevent the necessity of farther litigation. I think the reasons suggested by Mr. *Cotton* warrant us in doing so; and, construing the document according to the fair interpretation of its terms and with reference to the circumstances on which it originated, but not with reference to mere parol statements, which, though much urged in argument, cannot legitimately help us to understand it, I am of opinion the solution of the difficulties proposed by my noble and learned friend the Lord Chancellor, may be properly accepted by your Lordships. I do not say that, to my mind, that solution is entirely satisfactory, and I cannot fail to adopt it with some hesitation when I find it in conflict with the judgments of the learned Judges of the Courts below, which, however, are also materially in conflict with each other.

The agreement, drafted by an unskilled hand and marked by much obscurity, may be differently regarded by different minds, and whether it imports a partnership, or a loan, or some *tertium quid* partaking of the character of both, as seems to have been indicated in one of the judgments, we can scarcely, perhaps, determine with perfect clearness. But having regard to the express undertaking "to execute a deed of co-partnership," it seems reasonable to hold, with the Vice-Chancellor, that the Plaintiff and the Defendant *Syers* were constituted partners, at least as between themselves, although their subsequent reference to the Act of the 28 & 29 Vict. c. 86, shews that they meant their partnership to be peculiar in its nature and limited in its extent. And if they were partners, their relations as such, not binding them to each other for any definite period, may fairly be taken to have been dissoluble at will, and to have been effectually dissolved, as has been shewn already by my noble and learned friends. In whatever light the transaction may be regarded, as constituting partnership or loan of a special kind, I concur with them in rejecting as unreasonable a construction which would give, in consideration of the sum advanced, an interest in a business, such as we are dealing with, ot indefinite duration, incapable of being terminated at any ascertainable period, and difficult, if not impossible, to be maintained in the various probable contingencies which have been pointed at in the progress of the discussion.

On the whole, I repeat that I think the proposed solution of the difficulties of the case is the most acceptable, as being most in accordance with the language of the parties, and best calculated to do justice to both; and I concur in the suggestions of my noble and learned friend on the woolsack, as well with reference to the form of the decree as to the costs of the proceedings.

The following Order was afterwards entered on the Journals:

> That the Order of the Lords Justices of the 7th of May, 1875, be reversed; and it is hereby declared, that under the terms of the letter of the 8th of June, 1869, the Respondent *Daniel Backhouse Syers* became entitled, as a partner with the Appellant, to one-eighth share of the *Oxford Music Hall and*

Tavern, in the pleadings mentioned, and of the profits thereof, and that the partnership between them was dissolved at and from the 21st of February, 1873 (the time of filing the answer of the Appellant), and that the sum of £250 mentioned in the said letter is to be taken as capital brought by the said Respondent *Daniel Backhouse Syers* into the partnership; and it is farther Ordered and Directed,—

1°. That an account be taken of the receipts and payments of and respecting the said music hall and tavern, and of the gains and profits thereof exhibited by the account so to be taken, from the 8th of June, 1869, down to the 21st of February, 1873, and of what is coming to the Respondent *Daniel Backhouse Syers* for and in respect of his one-eighth part thereof, having regard to what he has already received on account.

2°. That an inquiry be made what sum would, on the 21st of February, 1873, have represented the Respondent *Daniel Backhouse Syers*' one-eighth share in the value of the said music hall and tavern if it had been then sold as a going concern, after deducting all charges thereon, and all liabilities of the business.

3°. That on payment by the Appellant to the Respondent *Daniel Backhouse Syers*, within a time to be fixed by the Judge in Chambers, of the sum coming to him under the heads Nos. 1° and 2°, together with interest at 5 per cent. per annum from the 21st of February, 1873, till payment on the sum coming to him under head No. 2°, no farther accounts be taken.

4°. That the Appellant do pay the costs up to and including the hearing before the Vice-Chancellor; the costs of the accounts to be in the discretion of the Judge in Chambers.

5°. If the payments specified in No. 3° are not made by the Appellant, that the said music hall and tavern be sold as a going concern, and that a division of the assets of the partnership be made in the usual way, with liberty to apply in Chambers as to the mode of carrying this direction into effect:

And Ordered, that the Appellant do pay or cause to be paid to the Respondent *Edward Louis Paraire*, the costs incurred by him in respect of the appeal, the amount thereof to be certified by the Clerk of the Parliaments: and that the cause be remitted to the Chancery Division to do therein as shall be just, and consistent with this declaration, these directions, and this judgment.

Lords' Journal, 29th February, 1876.

Solicitor for the Appellant: *W. Millman.*
Solicitors for the Respondent: *Barton & Pearman.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
March 2.

16 Ch D 621
622-3

JOHN NANSON AND JOHN DIXON, EXECUTORS . . . . } APPELLANTS;

AND

WILLIAM BONNALLIE GORDON . . . RESPONDENT.

Bankruptcy—Proof by Partner against Partnership.

It is the settled rule in bankruptcy that a partner cannot prove, under a joint commission against his firm, in competition with the creditors of the firm.

And this rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy.

ON the 24th of November, 1874, the Lords Justices, sitting as the Court of Appeal in Bankruptcy, reversed an order previously made, on the 27th of July, 1874, by the Chief Judge in Bankruptcy, which had allowed the present Appellants to prove as creditors under a liquidation of the estate of *Peter James Dixon*, *John Dixon*, and *Joseph Forster* (1).

In the year 1858 *Peter Dixon*, *Peter James Dixon*, *Robert Stordy Dixon*, *John Dixon*, and *Joseph Forster* carried on business at *Manchester* and *Carlisle* in co-partnership as cotton spinners, under the style of *Peter Dixon & Sons.*

By the co-partnership deed twenty shares of the business belonged to *Peter Dixon*. Upon the 1st of July in each year a general account was to be taken of the assets of the firm, and the valuation then made was to be written into two books, to be signed by each partner and to be binding on all. The 32nd article provided: "That in case any partner shall retire from the firm under the provision hereinbefore contained, or shall depart this life without having made a valid bequest of his shares in the firm, the shares of such retiring or deceased partner shall be taken by the continuing or surviving partners at their value, according to the stock-taking of the 1st of July immediately preceding such retirement or death, with interest at £5 per cent. per annum on the amount of such value, in lieu of profits, from such 1st day of July up to and inclusive of the day of such retirement or death."

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(1) *In re Dixon, Ex parte Gordon*, Law Rep. 10 Ch. Ap. 160.

The 33rd article declared that the amount due to such retiring or deceased partner, after deducting all sums received by him since the previous 1st of July, and also all moneys (if any) due by him to the firm, should be paid by the continuing partners to him, or to his executors, by fourteen equal annual instalments, with interest on each at £5 per cent. per annum. But the continuing partners were to be entitled to pay off "the balance for the time being due to the retiring partner, or the executors of a deceased partner," on giving twelve months notice.

The 35th article enabled any partner, in his lifetime, without any consent of the others, to transfer all or any of his shares to one or more of his sons or brothers.

The 36th article provided that if any partners retired, or died, and the continuing partners refused to take his share as beforementioned, the capital should be sold or converted into money immediately.

Peter Dixon died on the 28th of April, 1866 (having previously appointed the present Appellants his executors), but the business was continued by the other partners until the 1st of July, 1868. The value of his shares was calculated at the stock-taking on the 1st of July, 1866, and was ascertained to amount to £33,262 17*s.* 4*d.* His affairs became the subject of an administration suit in the Court of Chancery.

Robert Stordy Dixon retired from the firm on the 1st of July, 1868.

On the 11th of July, 1872, the remaining partners—*Peter James Dixon, John Dixon*, and *Joseph Forster*—presented a petition for liquidation under the *Bankruptcy Act*, 1869; and at a meeting of creditors, Mr. *Bonnallie Gordon*, banker, of *Carlisle*, was appointed trustee under the liquidation.

Mr. *Nanson* and the other executor of *Peter Dixon* presented a petition praying to be allowed to prove against the assets of the firm for the sum of £36,000, principal and interest, as due to the testator's estate. At first the trustee assented, but on the 23rd of June, 1874, made an application to the County Court of *Cumberland*, sitting at *Carlisle*, to expunge this proof, and it was ordered to be expunged. Upon appeal to the Chief Judge in Bankruptcy, this order was reversed. On appeal to the Lords Justices the order of the County Court Judge was restored (1). This appeal was then brought, and the proof was directed to be expunged.

Mr. *A. G. Marten*, Q.C., and Mr. *F. Hoare Colt*, for the Appellants:—

This case does not fall within that rule of the bankrupt law which forbids one member of a partnership to prove against the partnership his own particular claims in competition with the claims of the general creditors. In the first place this is not an ordinary partnership debt; it did not arise in the course of the trading; it is a debt created under the special provisions of a deed, and, on examination of the terms of that deed, appears to be a claim in respect of a purchase made by the partnership of the deceased's share in the assets and the profits.

In the next place, if a different construction should be put upon the transaction, it is submitted that the rule which may apply to a partner, should he attempt to prove his particular claim against the general partnership, cannot apply when his executors, who, as such, are not and cannot be partners, claim to prove in respect of his general assets. In *Ex parte Westcott* (2) such a proof was allowed; and though it might be said that the proof there allowed was in respect of a *devastavit*, still that shews that the Court recognised the distinction which might exist between the case of executors, who had a duty to perform to others, and that of the man himself, who was merely attempting to enforce his own claims, which might be rightfully affected by his own personal liabilities. Taking the general principle to be that, in respect of dealings between two partners, proof of the claim of one on the other could not be admitted while the general partnership debts remained unsatisfied, that would not affect this case, for here there was no dealing of that sort, but the claim arose after the partnership had been terminated by the death of *Peter Dixon*, and

(1) Law Rep. 10 Ch. Ap. 160, 161, n.

(2) Law Rep. 9 Ch. Ap. 626.

was a claim made by third persons in respect of a sale of part of his property. *Ex parte Hargreaves* (1), therefore, did not apply, for there the two partnerships and their mutual debts and credits were running on together. The articles of the partnership deed here were almost identical with those in *Vyse* v. *Foster* (2), which this House declared to constitute a contract for the sale of the testator's share to his partners; and, that being so, the transaction could not be treated as a mere debt, *inter se*, of the partners themselves, but was a substantive debt, having no relation to the partnership character of the creditor, but was a debt due to the executors as on a sale by them of part of the property of their testator. A dormant partner, who had dissolved partnership and had afterwards obtained a cognovit from his late partner for what was due to him on the balance of accounts, has been held entitled to prove the amount of his claim, though some of the partnership debts were unpaid: *Ex parte Grazebrook* (3). In *Ex parte Carter* (4) the claim was in respect of money which *Godwin* had himself advanced to the firm, and which he, as one of the partners, employed while he was alive and acting in the business of the firm, and after his death things went on as before, and the name of *Godwin* had been used to the last by the firm, and used with the consent of his executors, so that his estate itself continued in the partnership and formed part of the partnership assets. Lord *Eldon*, in his judgment, expressly referred to that fact (5) as strongly affecting the case. That was not so here. In the case of *Moore* (6) proof by one partner against the estate of the other was refused, but there the party claiming was really in the position of a surety who had not discharged his liability as such, and his undertaking to indemnify the joint estate was held not to be sufficient. The indemnity was treated by Lord *Eldon* as of no consequence. These two cases were therefore not applicable here, for here the debt arose after the death of the testator.

The two cases of *Ex parte Collinge* (7) and *Ex parte Topping* (8) shewed that the application of the rule of bankruptcy relied on

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(1) 1 Cox, 440.
(2) Law Rep. 7 H. L. 318.
(3) 2 D. & Ch. 186.
(4) 2 Gly. & J. 233.
(5) 2 Gly. & J. 239.
(6) Ibid 166.
(7) 4 De G. J. & S. 533. 9 Jur NS
(8) Ibid. 551. 11 Jur NS. 210

H. L. (E.)
1876
NANSON
v.
GORDON.

here was one within the discretion of the Court, and the present was certainly a case in which that discretion ought to be exercised in favour of the executors. And those cases could not here be used in support of this decree, for the persons there concerned were themselves the parties to the original transactions, and were not clothed with a representative character entitling them to claim in a representative right. In the latter of these cases Lord *Westbury* mentioned (1) the case where "the debt sought to be proved by the partner against his co-partner is a debt arising from an undisputed contract apart from the co-partnership, and which was in existence at the time of the adjudication in bankruptcy," as one where the rule might properly be relaxed. This is surely a case falling exactly within that description. In *Ex parte Edmonds* (2), which resembled this case, the executors of the deceased partner were held entitled to prove *pari passu* with the other creditors, and to receive dividends on an unpaid balance of their testator's money, though it had not been withdrawn from the partnership, but simply allowed to remain there, being secured only by a bond given to the executors by the surviving partners.

There was here no continuing joint estate of the original firm of which *Peter Dixon* had been a member, there was only the joint estate of the new firm, of which the executors were creditors as for property sold. The executors here could in no way be treated as having anything to do with the firm itself, except merely as being its creditors. In *Ex parte St. Barbe* (3), where there were two partners who were engaged, individually, in other concerns, it was held that as these other concerns were distinct from each other, there might be a proof by one on the bankruptcy of the other, the rule in bankruptcy applying only where the two businesses were but branches of one joint concern. So that there were several exceptions to the rule now asserted, exceptions rendered necessary by peculiar circumstances. Such circumstances existed here. The present case fell within the principle of these exceptions, and the joint creditors could not suffer from the claim now made, for the more the estate of *Peter Dixon* was increased the greater

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(1) 4 De G. J. & S. at p. 557. 11 Jur N.S. 211.

(2) 4 De G. F. & J. 488. 8 Jur N.S. 629.

(3) 11 Ves. 413.

H. L. (E.)
1876
NANSON
v.
GORDON.

would be the amount which they could obtain from it, as the estate of one liable to the debts of the joint partnership.

Mr. *De Gex*, Q.C., and Mr. *Davey*, Q.C., for the Respondent:—

The rule of bankruptcy law is clear, and this case affords no ground for exception to it. The cases of *Ex parte Sillitoe* (1) and and *Ex parte Carter* (2) state the principle distinctly. In the first of these cases Lord *Eldon* thus expressed himself (3): "The rule is that a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself." His Lordship admitted that there might be an exception to the rule, and mentioned there the case of *Ex parte Kendal* (4), where he said the partner became a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership. There was nothing of that kind here. And referring to *St. Barbe* (5), it was shewn that to make, in any case of that sort, proof under a joint commission admissible, the two trades must be really and entirely distinct from each other. Here there was but one firm, not two distinct firms, and the funds of the deceased remained in his firm in precisely the same manner as they had stood there before his death. Under circumstances such as exist here the proof cannot be admitted: *Ex parte Adams* (6). The rule now contended for was clearly stated in *Ex parte Ellis* (7), and was acted upon by the Lords Justices recently in *Ex parte Bass* (8).

It made no difference that the joint creditors might ultimately come upon the individual estate of *Peter Dixon* if this claim should be allowed. It is the settled rule of bankruptcy that the fund for payment of the joint creditors must not be affected by contin-

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(1) 1 Gl. & J. 374.

(2) 2 Gl. & J. 233.

(3) 1 Gl. & J. 382.

(4) Referred to in *Ex parte Sillitoe*, 1 Gl. & J., at p. 382, as reported in 1 Rose, 71. This reference must be a mistake. The case was probably *Lodge* and *Fendal*, 1 Ves. Jun. 166, 167, to which Lord *Eldon* correctly referred in *Ex parte Harris*, 2 Ves. & B. at p. 213, and *Ex parte Yonge*, 3 Ves. & B. 34.

(5) 11 Ves. 414.

(6) 1 Rose, 305.

(7) 2 Gl. & J. 312.

(8) 36 L. J. (N.S.) (Bankcy.) 39.

H. L (E.)
1876
NANSON
v.
GORDON.

gencies. And here there can be no doubt that there would not be, in fact, any thing of which they could avail themselves if this proof should be allowed. *Lindley* on Partnership (1) was also referred to.

Mr. *Marten* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, it appears to me, that the question which is submitted to your Lordships on appeal in this case is entirely covered by authority—by authority which has ranged over a great number of years, and has, indeed, become a leading principle in the administration of the law of bankruptcy. The statement of the general principle may be taken from a number of cases; but I may conveniently refer to the enunciation of it by Lord *Eldon* in the case of *Ex parte Sillitoe* (2): "A partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership but of himself."

My Lords, what are the facts of the present case so far as they are material? There is a gentleman of the name of *Peter Dixon*, in business with certain other partners; he dies, and, according to the contract of partnership, upon the occurrence of the death of a partner, his share in the assets is to be taken as it stood in the books of the concern on the 1st of the previous July; it is to be paid out by instalments ranging, I think, over fourteen years, and the surviving partners are to continue the business, paying out his capital in that way. Accordingly, the share of this partner was taken as it stood in the books of the concern, and it fell to be paid out by instalments as had been agreed upon. Before it was paid out the surviving and continuing partners became bankrupt. This transaction has been called a purchase and a sale, and has been treated as if it were something altogether independent of the partnership. My Lords, it is impossible to disguise the transaction by applying to it terms of that kind. It was a mode by which, for the obvious convenience of all parties, it was arranged that upon the death of a partner his share in the assets should be paid out to him, in certain instalments of money, in place of the concern being broken up and liquidated by a sale, and he was a creditor of the continuing partners for the amount of his interest in the concern thus ascertained.

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(1) 3rd Ed. p. 1227.

(2) 1 Gl. & J. 374.

My Lords, the continuing partners, as I have said, became bankrupt. But before they became bankrupt, *Dixon* himself died, and his estate came to be administered in the Court of Chancery, and is now being administered there. A large amount of debt which existed against the firm at the time when *Dixon* died, is still unpaid, and the creditors entitled to those debts have proved those debts in the administration in the Court of Chancery. Now, these debts of course have to be paid by the estate of *Dixon*, but they are also debts in the bankruptcy against the continuing partners, and, there being no joint estate, that is to say, no joint estate belonging to the firm as it was originally constituted, these debts will have to be paid out of the only estate in the bankruptcy, namely, the joint estate of those who were partners at the time of the bankruptcy. Your Lordships have therefore a case in which the estate of the deceased partner, *Dixon*, is liable to pay to these creditors that I have mentioned the amount of their debts, and those creditors are at the same time entitled to come upon the fund in bankruptcy, to have their debts paid out of that fund; and just in proportion as the estate of the deceased, *Dixon*, will carry away a portion of that fund for the payment of the debt due to him, in that proportion the fund which would be available for the payment of those creditors in the bankruptcy will be lessened.

Now, it is said that although it may appear at first sight to be a diminution, by the estate of *Dixon*, of the fund that would be paid to these creditors in the bankruptcy, that is to say would be paid to those persons in the bankruptcy who are besides creditors of himself, still in reality they will benefit and not suffer by that arrangement, because inasmuch as they are the whole, or almost the whole, of the creditors against his estate the dividend will be brought into his estate, and they will have the benefit of it there. My Lords, that is an accident. There

H. L. (E.)
1876
NANSON
v.
GORDON.

might have been separate creditors of *Dixon* to the amount of hundreds of thousands of pounds, in which case the process that I have described in place of being beneficial to his creditors who were creditors at the time that he was in the business, would have been in the highest degree injurious to them. And I think your Lordships have not heard any authority cited in which the Court has entered into an investigation of how the general rule enunciated by Lord *Eldon* in *Ex parte Sillitoe* (1) will apply in a particular case. Indeed, in a case which came before the Lords Justices, *Ex parte Bass* (2), it was expressly stated that it was not the habit of the Court, and would not be right in the Court, to investigate what might be called the outcome of the accounts, in order to determine, *à priori*, whether the rule ought or ought not to be applied.

Then, my Lords, it is contended, and this really has been the great topic of argument before your Lordships, that although the rule mentioned by Lord *Eldon* in *Ex parte Sillitoe* (1), and applied in so many other cases, exists where the person who seeks to prove against the estate in the bankruptcy is a living person, that rule does not apply where he has died, and where it is not himself but his estate which is coming and seeking to prove against the estate in the bankruptcy. If there was no authority upon that point, I should have said that it would be in the highest degree unreasonable and irrational to hold that if a trader had retired from a partnership, and that partnership became bankrupt, he, the trader, should not prove in competition with creditors so long as he lived, but that the moment he died his executors could do what he himself could not have done, and come in and prove in competition with the creditors; that is to say that the firm in which he was a partner having become bankrupt he would be unable, we will say, for one month after the bankruptcy, to prove in competition with the creditors, but if he should die on the last day of the month, that then his executors, as soon as they had proved his will, might at once come in and do the very thing that he could not have done. Could anything more whimsical, more capricious, or more irrational, be supposed? If the reason is that the hand to pay

(1) 1 Gl. & J. 374.

(2) 36 L. J. (N.S.) (Bankcy.) 39.

H. L. (E.)
1876
NANSON
v.
GORDON.

should not prove in competition with those who are to receive, then whether that hand to pay is the living hand of the man himself, or is the deputed hand of his executors, is utterly immaterial.

But, my Lords, is there any authority upon the subject? The case of *Ex parte Carter* (1) is express upon the point. Lord *Eldon* there admitted no distinction of this kind whatever, although he had before him the case of executors. He treated the case of executors exactly as if it had been the case of the person to whom they were executors. Is there any authority produced in the opposite direction? There is none; and I apprehend that to make a distinction upon a ground so unsubstantial, so unreal, so irrational, would be a course which your Lordships would be slow to adopt.

My Lords, I am bound to say that I concur entirely with the judgment delivered by the Lords Justices, and I submit to your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD:—

My Lords, the sole question to be determined is, whether the rule that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm applies to this case.

Under the will of *Peter Dixon* his executors allowed his share in the partnership to continue in the business, and the amount of it became a debt due to his estate from the continuing partners, as said by Lord *Eldon* in *Ex parte Carter* (2). At the time of the petition for liquidation being presented by the continuing partners, there were unpaid debts to the amount of £27,000, which were contracted by the firm while *Peter Dixon* was a member of it, and consequently for which his estate was liable. The debt claimed of the executors was in fact incurred by the continuing partners under the terms of the partnership deed, which provides that in case any partner should die without having made a valid bequest of his share, the share of such deceased partner should be taken

(1) 2 Gl. & J. 233.

(2) 2 Gl. & J. 233.

at its value, and the amount found due should be paid in a certain manner.

If there had been no actual bequest of *Peter Dixon's* share in the partnership, the value of it would have gone to his executors as a debt from the continuing partners to his estate. And the actual bequest does not vary, but confirms the relation between the parties. The position of the executors in their representative capacity is exactly similar to that of their testator. They are liable in respect of the estate to the creditors for debts incurred by the firm while *Peter Dixon* was a partner, and they are creditors of the firm in respect of the debt due to their testator for his share in the partnership. Therefore there can be no difference between the case of the partner himself and of his executors. They are equally within the range of the principle that a man shall not come into competition with his own creditors.

This conclusion seems to me to be supported by those authorities which are directly applicable to the circumstances of the present case, and is not to be shaken by cases on the other side which were decided upon the ground of not being at all within the rule, as in *Ex parte Westcott* (1); or of being exceptions to it, as in *Ex parte Kendal*, mentioned by Lord Chancellor *Eldon* in *Ex parte Sillitoe* (2).

Under these circumstances, my Lords, I agree with my noble and learned friend, that the order appealed from ought to be affirmed.

LORD HATHERLEY :—

My Lords, I entirely concur in the conclusion at which my noble and learned friends have arrived in this case. It appears to me that to decide otherwise than as the Lords Justices did, when the case was before them, would be to overthrow a rule which seems to have been settled at least some eighty years ago, and to have been acted upon ever since with certain exceptions, which I agree with the learned counsel in tsaying, onlytend to confirm the established rule.

(1) Law Rep. 9 Ch. Ap. 626.

(2) 1 Gl. & J. 382. See n. (4), *ante*, p. 200.

That rule is a simple one, and founded in justice in every respect, although there may be particular cases and occasions, as must be the case with regard to the general administration of assets, in which it may operate so as to involve hardship as regards the individual against whom it is applied. I do not, however, think myself that anything of that kind occurs here. The rule is, that all the assets of a trading firm are first to be dealt with to satisfy the creditors of that firm, following those assets through all their devolutions, with only certain regulations as between the different classes of creditors affecting those assets, as they may happen to be found at the time of the bankruptcy, the time when it becomes necessary to adjudicate upon the fund. Those assets are to be so applied before a person who has been a partner in the firm, and who is liable in respect of the dealings of that firm, can receive anything in respect of principal, or (for Lord *Eldon* said he could see no difference at all which would justify him in making a distinction) in respect of being interested as a creditor before the time of distribution. This is laid down in *Ex parte Sillitoe* (1) that the funds should be so applied that no partner should be allowed to take anything so long as a single creditor remains unpaid either as to his principal or his interest.

The foundation of the rule seems to me a rational and a just one, and when we come to apply it to this particular case it is immaterial whether it applies to a deceased person, or the executors of a deceased person. No shadow of a distinction can be drawn, it seems to me, between the position of that deceased person the day before his death and the position of his executors immediately afterwards. To allow executors to draw out of the fund a dividend in respect of a debt due to their testator, a quondam partner in the business, and a debtor as well as the surviving partners to the creditors of the firm, would be to establish a distinction without there being the least shadow of a difference, and to run counter to the principle which occasioned the rule, and which I have just stated. Some exceptions have been made to that rule; one was the case of a breach of trust on the part of executors, and another was the case of separate firms, which had clearly got a distinct and separate basis to stand upon—it was entirely confined to trade transactions between the two firms—not money transactions, such as a loan from one firm to the other. The exceptions being confined to cases of that description, tend very strongly to confirm and corroborate the rule, a rule which has never heretofore been departed from, and which it would ill become this House after a long series of decisions now to depart from, unless it can be shewn that the rule had been established on a false principle, which in the present argument has not in any way been shewn.

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(1) 1 Gl. & J. 374.

LORD O'HAGAN:—

My Lords, your Lordships are asked by the Appellants to set aside a well-established rule, supported by a series of decisions of the highest authority, which are not really encountered by a single decision on the other side, and without any special grounds of reason or justice to induce your departure from it in this particular case. The admission by the learned counsel, that the estate of *Peter Dixon* continues liable for the joint debts of the partnership, appeared to me to bring it at once within the operation of the principle which forbids a partner to prove in competition with the creditors of his firm, who are, as Lord *Eldon* has said, "his own creditors," so as to diminish the funds available for their benefit.

Very ingenious efforts have been made, but, in my opinion, vainly, to distinguish this case from *Ex parte Carter* (1) and *Ex parte Collinge* (2), which are precisely in point, and distinctly applicable to the circumstances presented to your Lordships. They are sustained strongly by *Ex parte Bass* (3) and other cases, and *Ex parte Topping* (4) and *Ex parte Westcott* (5) alone relied on for the Appellants, when rightly understood, are quite consistent with them.

The death of *Dixon* appears to me to be immaterial for the purposes of your Lordships' decision. Executors, who represent their testator in such a case as this, stand in his place *quoad* a debt which was his during his lifetime, having the rights which he would have possessed, and affected by the disqualification to which he would have been subject, had he continued to exist. And so Lord *Eldon* held in *Ex parte Carter* (1).

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(1) 2 Gl. & J. 233.
(2) 4 De G. J. & S. 533. 9 Jur NS 1212.
(3) 36 L. J. (N.S.) (Bankcy.) 39.
(4) 4 De G. J. & S. 551. 11 Jur NS 210
(5) Law Rep. 9 Ch. Ap. 626.

I think it also immaterial whether the claim sought to be proved by the partner is a definitively-ascertained debt, or a debt merely ascertainable; and I see no reason for holding that, the demand of the executors being for money lent, they are on that account enabled to evade the rule, which, in my view of it, forbids them to prove in competition with the creditors of their testator.

These were the chief grounds of the argument for the Appellants. In my opinion it failed on both of them; and this being so, I content myself by saying that I think your Lordships have been well advised to refuse to disturb a rule of law so long in operation, having such high sanction, and apparently so equitable in itself and so beneficial to the public interests. I think that the proof should be disallowed, the judgment of the Lords Justices affirmed, and the appeal dismissed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 2nd March, 1876.

Solicitors for the Appellant: *Pattison, Wigg, & Co.*
Solicitors for the Respondent: *James, Curtis, & James.*

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(1) 2 Gl. & J. 233.

[HOUSE OF LORDS.]

WILLIAM ALLISON . . . . APPELLANT;

AND

THE BRISTOL MARINE INSURANCE COMPANY (LIMITED) AND OTHERS . . . . RESPONDENTS.

H. L. (E.)
1875
July 1.
1876
Feb. 25;
March 30.

11 App Cas
719.
6 QBD 651

Policy on Freight—Prepayment.

Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid: and such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner.

A ship was chartered to sail from *Greenock* to *Bombay*, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading less four months' interest at Bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at *Bombay*, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on *London* at six months' sight." Half of the estimated amount of the freight was paid in *London*. The shipowner effected two insurances, one for £500 "on freight valued at £2000," the other for £700 "on freight payable abroad valued at £2000." The ship was lost before entering *Bombay* harbour, but one half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—

Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in *England*; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half.

The *dictum* of Lord *Kingsdown* in *Kirchner* v. *Venus* (1) considered and explained.

THIS was an appeal under the *Common Law Procedure Act*, 1854. The Plaintiff *Allison* was the owner of a ship called the *Merchant*

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(1) 12 Moo. P. C. 361.

Prince, belonging to the port of *Glasgow*. On the 7th of March, 1867, the Plaintiff chartered this ship to Mr. *De Mattos* of *London*, for a voyage from *Glasgow* to *Bombay* with a cargo of coals. The material parts of the charterparty were those which related to the payment of freight, and they were in the following terms:

"*The freight to be paid on unloading and right delivery* of the cargo at and after the rate of 42*s*. sterling per ton of 20 cwts., on the quantity delivered, in full of all port charges, pilotages, *Bute Dock* wharfage, harbour dues on cargo, and *Dover* and *Ramsgate* dues, as customary, and such freight is to be paid, say, one half in cash on signing bills of lading, less four months' interest at Bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on the gross amount of freight in lieu of consignment at *Bombay*, and the remainder on right delivery of the cargo, agreeably to bills of lading, less cost of coal short delivered, in cash, at current prices of exchange for bills on *London* at six months' sight . . . . The vessel to be addressed to the freighter's agent free of commission."

On the 13th of April, 1867, the Plaintiff effected with the Defendants an insurance for £500 "on freight valued at £2000."

On the 15th of April the master signed bills of lading acknowledging the delivery on board of 2178 tons of coal.

On the same day the Plaintiff gave the following receipt, indorsed on the bill of lading, acknowledging the payment of half the stipulated freight:

"Received from *W. N. De Mattos*, Esq., the sum of £2286 18*s*. sterling, being advance of half freight on within shipment, the owner having paid all charges, including consignment commission at *Bombay*, as per charterparty."

On the 23rd of April the Plaintiff effected with the Defendants another insurance for £700 "on freight *payable abroad* valued at £2000." He also effected two other policies with other insurers, bringing the whole amount of freight insured up to £2000, which was the sum he expected to receive on delivery of the full cargo.

On the 20th of April *De Mattos* effected, on his own behalf, an insurance on the cargo of the *Merchant Prince* for the said voyage.

The policy stated it to be "on 2178 tons of coals, and increased value thereof, by prepayment of freight, valued at £4500."

On the 27th of April, 1867, the ship left *Greenock* for *Bombay*. On the 8th of August it struck on a reef called *Chaoul Kadee Reef*, about eight miles from *Bombay*, and there became a total wreck. About 1050 tons of coals were saved and landed at *Bombay*, and there sold. No charge for freight was made at *Bombay* in respect of this half of the cargo actually delivered, the master treating that part of the cargo as constituting the half on which the freight had already been paid in *England*. The Plaintiff claimed as for a total loss of the half of the freight thus left unpaid.

The Plaintiff brought his action on the two policies. The first count of the declaration was on the policy for £700 on "freight payable abroad"; the second count on the policy for £500. There were the usual money counts.

The Defendants pleaded as to both counts, except as to £250, payment into Court of £440, and as to the £250 payment, and as to the money counts never indebted.

The cause was tried before Mr. Justice *Brett* in December, 1872, when by consent a verdict was taken for the Plaintiff for the damages in the declaration, subject to leave for the Defendants to move to enter the verdict for them, or to reduce the damages. A rule for that purpose having been obtained in the Court of Common Pleas, the case was there argued, and Lord Chief Justice *Bovill*, Mr. Justice *Brett*, and Mr. Justice *Grove* were of opinion that the Plaintiff was entitled to claim as for a total loss, and discharged the rule. The case was taken on appeal to the Court of Exchequer Chamber, where Mr. Baron *Cleasby* and Mr. Baron *Pollock* were for affirming the judgment, but Lord Chief Justice *Cockburn*, Mr. Justice *Mellor*, and Mr. Baron *Amphlett* were for reversing it (1). It was accordingly reversed, and this appeal was then brought.

The Judges were summoned, and the Lord Chief Baron *Kelly*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Justice *Brett*, Mr. Justice *Grove*, and Mr. Baron *Pollock*, attended.

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(1) Law Rep. 9 C. P. 559.

Mr. *Watkin Williams*, Q.C., and Mr. *J. A. McLeod* (Mr. *Cohen*, Q.C. was with them), for the Appellant:—

The policies cover the freight, which had to be earned, and which could only be earned on right delivery of the cargo. That was the freight on one half of the cargo. The freight as settled by this charterparty was divided into two lump sums, one was to be paid here, and was paid here; the other was to be paid at *Bombay*. As only one half the cargo was delivered at *Bombay*, and the payment of freight was to be on right delivery of the cargo, the half cargo delivered was properly treated as the half on which the freight had been paid in *England*; the other half of the cargo not being delivered at all, no freight could be demanded for it. The freight on it was lost, and that was the freight in respect of which the Plaintiff had effected his insurances, and on them he is entitled to recover as for a total loss.

The money paid in *London* was not a loan, but a prepayment of half the freight. It could not have been recovered back: *De Silvale* v. *Kendall* (1). It was distinctly declared in the charterparty itself to be freight, and the facts of this case do not allow it to be brought within the dictum of Lord *Kingsdown* in *Kirchner* v. *Venus* (2), the circumstances of the two cases being entirely different. Wages would be due on the part so prepaid, as if the ship had safely arrived in the delivery port: *Anonymous* (3). In *The Karnak* (4) it was held that the question, whether an advance of money was to be treated as a loan or as a prepayment of freight, must depend on the instruments executed between the parties, and that decision was in accordance with the previous case of *Hicks* v. *Shield* (5).

The insurable risk which the Plaintiff had was the one-half of the whole amount of the cargo which had to be earned—that one-half was lost. He had nothing to do with insuring the other half that had been paid, which, being a sum that might be lost, for it could never be recovered back from the shipowner, the charterer had good title to insure, but what the charterer did in that manner can in no way affect the rights of the Plaintiff upon that half of the freight which, if the ship had arrived safely, he would have been entitled to receive; which he did not receive, because the ship did not arrive safely, and which, therefore, he is entitled, as a total loss, to recover from the underwriters.

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(1) 4 M. & S. 37.

(2) 12 Moo. P. C. 361, at p. 390.

(3) 2 Show. 283.

(4) Law Rep. 2 A. & E. 289.

(5) 7 El. & Bl. 633. 3 Jur N.S. 715

Mr. *C. Russell*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Fullerton* was with them), for the Respondents:—

The question in this case really depends on the construction of the charterparty. The argument on the other side depends for its force on the assumption that the payment in advance is a payment of freight; but that assumption is not warranted by the authorities. The fact that the parties give it that name cannot confer upon it the legal character of freight. Lord *Kingsdown*, in delivering the judgment of the Privy Council in *Kirchner* v. *Venus* (1), states that proposition very fully. He says: "A sum of money payable before the arrival of the ship at her port of discharge, and payable by the shipper of the goods at the port of shipment, does not acquire the legal character of freight, because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is in effect money to be paid for taking the goods on board and undertaking to carry, and not for carrying them." *Manfield* v. *Maitland* (2) had already established a similar proposition. In this case the 42*s*. per ton must be distributed over the whole of the cargo; one-half of that sum had been paid here, and in consequence of that payment there remained but 21*s*. per ton to be paid. But of the tons sent out, only one-half was delivered, and the loss of freight is that which was suffered in respect of the other half. That was half of the whole, on which whole half had been already paid, reducing the sum to be paid to 21*s*. the ton on each ton, whether delivered or lost.

If the Plaintiff could recover on this claim, the charterer would, by the arrangement between him and the Plaintiff, obtain a double advantage; he would obtain back, under his insurance, what he had already paid, and he would have got his half cargo carried for nothing, while nothing had been charged him for freight of what was lost. It could not be the policy of the law to sanction arrangements which would produce such results as these, and convert in-

(1) 12 Moo. P. C. 361, at p. 390.

(2) 4 B. & Ald. 582.

H. L. (E.)
1875-6

ALLISON
v.
BRISTOL
MARINE
INSURANCE CO.

surances from a mode of indemnity against loss into a means of profit from its happening.

[There were many cases cited in illustration on both sides of the argument; they are all referred to in the opinions of the Judges or the judgments of the Lords.]

Mr. *Watkin Williams* replied.

THE LORD CHANCELLOR proposed the following question to the Judges:—

Whether, upon the circumstances of the case, there was a total or only a partial loss of the subject-matter of insurance?

The Judges requested time to consider.
Adjourned.

1876
Feb. 25.

LORD CHIEF BARON KELLY.

LORD CHIEF BARON KELLY:—

My Lords, I venture to think that some topics have been introduced into the discussions which have taken place in this cause, that are either immaterial altogether or irrelevant. The substance of the whole case is this: The Plaintiff, having granted a charterparty of his ship, the *Merchant Prince*, to carry a cargo of coals from *Greenock* to *Bombay*, the freight upon which was estimated at £4000 and upwards, received under a provision of the charterparty £2000 and upwards, in advance of the freight; and he insured by policies, before and after the date of the charterparty and advance, "freight payable abroad" valued at £2000. He had thus secured to himself one-half the freight by the payment in advance; and he secured himself, by thus insuring, the other half (£2000) by the policies in question. The ship was lost, but one-half of the cargo arrived at *Bombay*, and was landed in safety. The freight on this half was met, in the strict terms of the charterparty, by the advance made at its execution; and the other half freight (the cargo not having reached *Bombay*) was lost. And the Plaintiff now claims the loss as a total loss under the policies. It was only this unpaid half that he insured, and this he has lost; and this I am of opinion is a total loss, and that the Plaintiff is entitled to your Lordships' judgment.

H. L. (E.)
1876
ALLISON
v.
BRISTOL
MARINE
INSURANCE CO.
MR. JUSTICE
BRETT.

MR. JUSTICE BRETT :—

My Lords, in this case the action was brought by the Plaintiff, a shipowner, on two policies of insurance to recover an alleged total loss of freight. The first policy described the subject-matter insured as "freight valued at £2000"; the second described it as "freight, payable abroad, valued at £2000." The Plaintiff claimed for the total loss of freight which he alleged would, if there had been no loss, have been payable to him under a charterparty made between him, as shipowner, and *De Mattos*, as charterer. By the charterparty, dated the 7th of March, 1867, the ship was to load at *Greenock* a cargo of coals, and proceed forthwith to *Bombay*, and there deliver the same. "The *freight to be paid on unloading and right delivery* of the cargo at and after the rate of 42*s.* per ton *on the quantity delivered*," &c.; and "*such freight*" *is to be paid*, say, one-half in cash on signing bills of lading, *less four months' interest, &c.*, 5 *per cent. for insurance,* and 2½ per cent. on the gross amount of freight in lieu of consignment at *Bombay*, and "*the remainder*" on delivery of the cargo agreeably to bills of lading, less cost of coals short delivered, in cash, &c. The vessel to be addressed to the freighter's agent abroad, free of commission—owners to have an absolute lien on the cargo for freight, &c. Under this charterparty, the charterer loaded about 2000 tons of coal on board the ship, and paid the Plaintiff about £2000. The bills of lading were dated the 15th of April, 1867. A receipt was given by the Plaintiff on the same date, indorsed on the bills of lading, for the sum received, in the following terms: "being advance of half freight on within shipment," &c. The dates of the policies sued on were the 13th of April, 1867, and the 22nd of April, 1867. There were four policies in all effected by the Plaintiff, by which, collectively, the amount insured was £2000.

Upon the case, as stated, the Court had power to draw inferences of fact. Half the cargo was lost, and half was delivered at *Bombay*. In the Court of Common Pleas, it was argued on behalf of the underwriters that they had a right to treat the policies as insurances of the whole freight to be earned by the ship; because the policies were in general terms "on freight"; and there was no notice of any other than the whole freight. Upon this it was answered on behalf of the Plaintiff, and determined by the Court, that, as matter of law, the policy in general terms must be held to take effect, either upon such freight as the assured had at risk on the voyage insured, or as he had at risk and intended to insure, and, as matter of fact by deduction, that, in this case, the insured intended to insure the freight which he supposed he had at risk, namely, about £2000, the amount which he would have to receive at *Bombay* if the cargo arrived safely, and which he supposed he would lose if the cargo was lost.

This decision of the Court of Common Pleas was founded on the facts in this case, and on the cases of *Irving* v. *Richardson* (1) and *Stephens* v. *Australasian Insurance Company* (2). Those cases seem to me to justify a decision, that by reason of the general understanding of merchants, which has been sufficiently made known to the Courts, it is to be held, as matter of law, without farther proof, that wherever the subject-matter of a policy is described in it in general terms, it is to be taken to cover the interest, which is within its terms, which the assured has at risk, unless the contrary appears to have been the intention of the assured from other parts of the policy, or other proof. In this case, if the matter be not of law, it seems to me clear upon the facts that the Plaintiff intended to insure, not the whole charterparty freight, but the part which had not been paid to him when the ship sailed, and which he evidently estimated at £2000. It will be observed that the judgment of the Court of Exchequer Chamber assumes that this was so, and that this point was not pressed before your Lordships. For it was admitted before your Lordships, in argument, by the counsel for the Respondents, that the whole question must ultimately depend upon the construction of the charterparty, whether the shipowner could by virtue of it claim, under the circumstances, anything from the charterer. "I admit (he said) "that if he could claim nothing, there was a total loss."

The question, therefore, is, whether upon the proper construction of the charterparty, as between the shipowner and charterer, the shipowner could or could not, under the circumstances, have maintained a claim against the charterer for any amount of freight beyond the sum paid to him when the bills of lading were signed. The first observation I will venture to make is, that this question should be determined upon a consideration of the charterparty alone, that is to say, as if no policy had been effected. And secondly, that the construction of it, as of any other mercantile document, should not be made to depend on its strict grammatical form, or on the apparent meaning of any one phrase in it taken by itself, but on the apparent expressed meaning, as to practical results, of the whole. It should be construed by considering the terms of it, and the decisions in former cases of terms similar, though perhaps not identical. Upon charterparties and bills of lading similarly framed, the disputes found in the books to have been raised have been, whether the money advanced should be treated as a loan or as an advance of freight: if the first, whether it should be deducted from freight, if freight should be earned, or be paid back wholly or in part to the charterer, if no freight, or not a sufficient amount of freight, should be earned by delivery at the port of discharge; if the second, whether if, in fact, paid, it, or any part of it, should be paid back; or, if not paid, whether it could be claimed by the shipowner where, in either case, by perils of the sea, the cargo should not be delivered at the port of discharge.

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(1) 2 B. & Ad. 193.

(2) Law Rep. 8 C. P. 18.

The first case on the subject, so far as I know, is the *Anonymous Case* (1). "*Advance money* paid before, *if in part of freight and named so in the charterparty*, although the ship be lost before it come to a delivery port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money." As the terms of the suggested charterparty are not given, the case is of little assistance as to the construction of the present charterparty; but it suggests a distinction between charterparties, namely, that by some, the advanced payment is a payment in part of freight, and in others not; and if not, the advance must be a loan. And it is an authority that, in the reign of *Charles* II., the acknowledged understanding, the rule was, that money to be paid in advance of freight, by the terms of the contract of carriage, could not, if paid, be demanded back in consequence of the loss of the ship and cargo on the voyage.

In *Blakey* v. *Dixon* (2) the declaration alleged a promise to pay the money due for freight on a delivery of the bill of lading, and then alleged the delivery of the bill of lading, and that by

(1) 2 Show. 283.

(2) 2 B. & P. 321.

reason thereof the Defendant was liable to pay the freight. There was no allegation of the arrival of the ship, or of the delivery of the goods. Upon a special demurrer, Lord *Eldon* and others decided for the Defendant. But the judgments obviously intimate, that if the promise or contract *to pay* the freight *on the delivery of the bill of lading* had been set out with sufficient particularity, the claim might have been supported without alleging the arrival of the ship, or delivery of the cargo. Such intimation is authority for the proposition, that if by the contract there is to be a prepayment of the freight, or part of it, an action may be maintained for such money before the cargo has arrived, or although the cargo be lost. It was stated by Serjeant *Shepherd* in that case, that it was always customary in the carriage of goods to *India* to contract for payment of freight previous to the sailing of the ship.

In *Mashiter* v. *Buller* (1) the evidence is said to have consisted of the bills of lading, some of which stated that the goods were to be delivered at *Lisbon*, "freight for the said goods being paid in *London*," and others "the shippers paying freight for the said goods in *London*." The ship sailed, but was lost in the *Downs*. Lord *Ellenborough* held, that the words in these bills of lading only meant, that the freight should be paid in *London* instead of in *Lisbon*; and that they by no means dispensed with the performance of the voyage. He added, that *if the Defendants had paid the freight upon the shipment of the goods, they might have recovered every penny of it back again.* The decision, it should be observed, is, that by virtue of those bills of lading, expressed as they were, the only stipulation was that the freight should be paid in *London* instead of at *Lisbon*; that is to say, that it did not alter the time of payment, but only the place. The freight, according to that construction, was not payable until after the ship had arrived at *Lisbon*, though it was to be paid in *London* instead of in *Lisbon*. If this was a correct construction, the result of the case, and the other remarks made in it, were of course correct. If it was not, the result and the remarks have since frequently been over-ruled. The case is no authority upon any question of law arising where money to be paid for the carriage of goods in ships is, by the contract, to be paid before the delivery of the goods.

(1) 1 Camp. 84.

In *Andrew* v. *Moorhouse* (1) the Plaintiffs, the shipowners, were held to be entitled to recover, after the loss of the ship on the voyage, the whole amount of freight for the whole cargo shipped, because the contract of carriage was found to be a contract to carry the goods to the *Cape* for £5 per ton, and there to deliver them, "freight being paid," and also that "*the £5 was to be paid in London.*" The Court held that if the true construction of the contract was that the freight was to be paid in *London on the sailing of the ship,* the shipowner was entitled to recover the whole of it, although none of the cargo had been carried to the port of delivery by reason of the whole having been lost at sea. No point was made of each party bearing half the loss; the charterer had to pay the whole of the freight, after the loss, because he had agreed that the whole should be prepaid.

In *De Silvale* v. *Kendall* (2) the action was brought by the charterer to recover back money paid in advance. The charter-party was as nearly as possible in the same form as in the present case. It was, amongst other things, to convey cotton from *Maranham* to *Liverpool,* at and after the rate of 2½ annas per lb. weight *for each and every pound of cotton which should be delivered at the King's Beam in Liverpool, such freight to be paid as follows,* viz., as much cash as may be found necessary for the vessel's disbursements at *Maranham* to be advanced, &c., *free from interest and commission,* &c., and the residue of such freight to be paid on the delivery of the cargo in *Liverpool.* The Plaintiffs, the charterers, advanced £192 at *Maranham* for the ship's disbursements. A cargo was loaded, but the ship was captured on the voyage, and never arrived at *Liverpool.* It was argued that the advance was either a loan or an advance of part of the freight, *liable to be refunded if in the result no homeward freight should become due.* It was held that the advance was a *prepayment of freight,* and that, by the law of *England, prepaid freight* is not to be returned because by accident the cargo is lost. "If" (says Lord *Ellenborough,* who had decided *Mashiter* v. *Buller* (3)), "the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word

(1) 5 Taunt. 435.

(2) 4 M. & S. 37.

(3) 1 Camp. 84.

freight) should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate?" This shews what was Lord *Ellenborough's* view of the law, and gives the true measure of *Mashiter* v. *Buller* (1). In order to interpret the charterparty all the Judges rely upon the phrases "*such freight* to be paid as follows," and "*the residue of such freight* to be paid," &c., which are the words used in the present charterparty. They also, it is true, rely upon the stipulation that the advance is to be "free from interest and commission." What effect the presence of the latter stipulation has will be seen in subsequent cases.

In *Manfield and Another* v. *Maitland* (2) the action was on a policy to insure an acceptance of £219. The acceptance had been given by the Plaintiff, the assured, in pursuance of a charterparty, by which he had chartered a ship to carry deals from *Quebec* to *Bridgwater*, and there deliver them, being paid freight for the deals £10 5*s.* per hundred, one half of the freight to be paid *in cash* on unloading and right delivery of the cargo, and the remainder by *bill on London at four months.* The *captain to be supplied with cash for the ship's use.* The ship was lost. It was held, that the Plaintiff had no insurable interest under the policy, because, on a true construction of this charterparty, the advance was not a prepayment of any part of the freight, but only a loan. Being a loan, the Plaintiff was entitled to deduct it from freight, if freight became payable, and to claim its repayment if no freight became payable. In that charterparty, it will be observed, the whole of the freight was made payable on the unloading and right delivery; half of it was to be paid *then* in cash, and half *then* by bill to be then given. The stipulation as to the advance was not incorporated into a sentence headed, "*such freight* to be paid, &c." There were no words such as "the *residue of such freight* to be paid on delivery," &c.

In *Saunders* v. *Drew* (3) the action was brought to recover back money paid in advance. The charterparty was in part for the hire of the ship for an intermediate voyage at the rate of £1 per ton per month for every ton of the ship's register tonnage; the charterer to pay four months *of such monthly hire* in advance, and the

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(1) 1 Camp. 84.

(2) 4 B. & Ald. 582.

(3) 3 B. & Ad. 445.

balance that may be due, at the termination of the period for which she may be hired, in cash at the port where she may be discharged. The ship was hired for the intermediate voyage, and the Plaintiff paid in advance £1734 for four months' hire. The ship was lost two months after the hiring. It was held, that the Plaintiff could not recover back any part of the £1734, because it was in terms a prepayment of part of the freight. There was no suggestion made in argument or judgment that the charterer and shipowner should each bear half the loss, and that therefore the Plaintiff should recover back the payment in respect of one of the two lost months.

In *Hall* v. *Janson* (1) a declaration on a policy was held good on general demurrer, because it alleged that the insurance was expressed in the policy to be on freight, and then alleged, as a fact outside the policy, "that *Edward Serreys* was interested in the money so insured, as being money advanced to him, as owner of the ship, on account of freight, and *being subject to the risk of the said voyage.*" It was held, that it was consistent with this allegation that, although, by the contract of carriage, the advance was to be on account of freight, it was stipulated by the same contract that it should be returned if the ship should be lost. This case suggests prepaid freight, but accompanied by an express stipulation that it should be repaid if the cargo should not arrive. It is, however, in truth, a case of pleading, and not of a real business transaction.

In *Hicks* v. *Shield* (2) the charterparty was between the Plaintiff as charterer, and the Defendants as owners, to carry rice from *Rangoon* to *London*, and there deliver the same, on being paid freight as follows: £5 5*s.* per ton net rice delivered, &c. *Cash for ship's disbursements to be advanced* to the extent of £300, free of interest, but *subject to insurance*, and 2½ per cent. commission in full of port and pilotage charges, &c. The freight to be paid on unloading and right delivery, &c. The Plaintiff advanced £300, the ship was lost. The question was, whether the Defendant was bound to repay the whole or any part. It was argued, that the advance was a mere loan. It was held otherwise, because of the indication, arising from the stipulation that the advance might be insured. "The only question" (says Lord *Campbell*) "is whether this was a mere loan, or an advance of freight. A sum of £300 is to be advanced, subject to certain deductions, one of which is for insurance. If it is to be insured, it must be for freight in advance; for a mere loan could not be insured; and if it is not a mere loan, but advance of freight, the Plaintiff cannot recover it back." In the course of the argument, *Crompton*, J., pointed out, that if it was a loan, it could not be insured either by the charterer or the shipowners; neither would be subject to loss by sea risk. In that case the stipulation as to insurance was relied on, in the absence of such phrases as "such freight to be paid as follows," and "the residue of such freight to be paid on delivery." It is an authority as to the effect of the stipulation as to insurance, and shews that the effect is, that it indicates that the advance is an advance of freight, and is not by way of loan. Again, there is no allusion to the idea of each party bearing half the loss.

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(1) 4 El. & Bl. 500. 1 Jur. N.S. 571 (2) 7 El. & Bl. 633. 3 Jur. N.S. 716.

In *Jackson* v. *Isaacs* (1) the declaration was on a charterparty between the Plaintiff as owner, and the Defendant as charterer, by which the ship was to carry a cargo of salt to *Fernando Po*, and there deliver the same, on being paid freight at 20*s*. per ton on the quantity shipped, *payable by charterer's acceptance* at four months *on ship clearing* at the *Custom House, Liverpool, subject to insurance.* Breach for not giving the acceptance. Plea that the freight was to be paid in advance, *subject to insurance*, and that the Plaintiff never did insure for the benefit of the Defendant, or otherwise howsoever, and that the ship and cargo were wholly lost, &c. Demurrer. It was argued by the Plaintiff, that the contract appeared to be a contract to pay freight in advance, subject to a deduction of the premium for insurance; that the Plaintiff, after payment to him of the advance, would have had no insurable interest; the risk would have been on the Defendant; he therefore was the only party who could have insured; and that the reasonable construction of the contract was, that he should deduct the cost of doing so. It was argued for the Defendant, that the true construction of the contract was, that the Defendant agreed to advance freight, subject to the Plaintiff insuring to the Defendant, in case of loss of the cargo, the return of the

(1) 3 H. & N. 405.

freight, either by repaying it or insuring it for the Defendant. The plea was held to be bad for several reasons. But Baron *Watson* gave this reason, "There is no doubt what is meant by this stipulation. It provides for a payment of freight in advance. The Defendant, then (who was the charterer), was the only person who could have insured the freight. It therefore seems clear, that the payment by the Defendant was to be subject to a deduction for the expense of the insurance which he was to effect." This case shews the true meaning of the stipulation, that the charterer will advance freight, or a part of it, "*subject to insurance*," or "*less insurance*." If there had been no advance, the shipowner would have had to insure. If the charterer had advanced without deduction, the shipowner would have obtained the full freight without the burden of having to insure, and the charterer would have had to pay the full freight, and besides to insure. In order to restore the position of both to what it would be if the freight were to be paid at the end, instead of at the beginning, of the voyage, the advance is paid, less insurance. The shipowner gets the freight at the beginning, less what he would have had to pay for insurance if he were only to get the full freight at the end; the charterer pays the freight at the beginning, less the amount which he must, for so doing, have to pay for insurance against the risk cast upon him by the prepayment. This is precisely the explanation of the present charterparty given by Baron *Cleasby* in the Court of Exchequer Chamber.

In *Byrne* v. *Schiller* (1) the action was on a charterparty between the Plaintiff as owner, and the Defendant as charterer, to recover a sum of £737, alleged to be due for advance freight, although the ship was lost on the voyage. The charterparty was to carry rice in bags from *Calcutta* to *Colombo*, the charterer paying freight on the same at, &c., per bag of *rice delivered; such freight to be paid as follows:* £1200 to be advanced at *Calcutta* against master's receipt, *and to be deducted, together with* 1½ per cent. commission on the amount advanced and *cost of insurance, from freight on settlement thereof*, and *the remainder* on right delivery of the cargo at port of discharge. The master to sign bills of lading at any current rate of freight required, without prejudice to the charterparty, but not under chartered rates, *except the difference is paid in cash.* It was held, that both the £1200 and the £737, which was the difference between the bill of lading and charter freight, were sums agreed to be paid *as advance of freight*, and therefore that the Plaintiff was entitled to recover the whole of both, although the ship was lost on the voyage. In the Court of Error, it was argued by Mr. *Butt* for the Defendant, in an exhaustive argument of great research, that a prepayment of freight is not final, but can be recovered back if the goods are lost, and the freight, therefore, never earned. In answer, *Cockburn*, C.J., said: "We are all agreed that the law is too firmly settled for us to depart from it, even in a Court of Appeal, that where freight is paid in advance it cannot be recovered back." It was also held that, upon a true construction of the charterparty, both sums, that of £1200 and that of £737, were payments to be made in advance of freight. It should be observed, as to the £1200, that not only that sum was to be deducted, but also the cost of insuring it was to be deducted, from the freight to be earned. And, farther, that no one suggested that anything less than the whole advance freight was payable, although the whole cargo was lost.

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(1) Law Rep. 6 Ex. 20; in error, Ibid. 319.

It becomes necessary, in the next place, in consequence of the argument founded on them, to consider the true import of the often-quoted words of Lord *Kingsdown* in *Kirchner* v. *Venus* (1). In that case there was no dispute that the freight was payable by the shipper in advance. It was agreed that it should be paid by him in advance at *Liverpool.* The port of discharge was *Sydney.* The bills of lading were indorsed for value. The shipper did not make the stipulated payment in advance. The captain at *Sydney* claiming a lien on the cargo for freight, refused to deliver the cargo to the assignee of the bill of lading without payment by him of the freight. The advice of the Council was, that there was no lien. It was not necessary to say, that advance freight was not freight at all. It was only necessary to say, that the incident of lien did not attach to freight so to be paid. And I think that the latter is all that is said by Lord *Kingsdown.* He does not say, that the money payable in advance is not freight at all. Contrasting the characteristics or incidents of the money agreed

(1) 12 Moo. P. C. 361.

H. L. (E.)
1876
ALLISON
v.
BRISTOL
MARINE
INSURANCE CO.

MR. JUSTICE
BRETT.

to be paid in advance for the carriage of goods in a ship, with those of money to be paid on delivery of the goods, he says, that the first does not acquire the *legal character* of the other, nor does it acquire *its legal incidents.* By the first, he is alluding to the characteristic of freight not being payable till earned by carriage, and by the second, to the incident of lien. So, in the next phrase, he does not say that the money *is paid for* taking the goods on board, &c., but that it is so in effect. He did not mean to say that prepaid freight, or money to be paid in advance of freight, is not freight, or a part of the freight for the carriage of the goods, otherwise, in the first place, he would, if the whole freight were to be prepaid, leave it,—that the cargo was to be carried on the voyage for nothing, and indeed, as it would seem, that there would be no contract to carry on the voyage; and in the second place, at least, he would reduce such advance to a loan, and so hold in contravention of all the cases. The decision is, that where the agreed time of payment of the freight is not contemporaneous with the time of delivery of the cargo, there is no implied right of lien. The observations of Lord *Kingsdown* are pointed to that question. The true meaning of them is, that, so far as concerns a question of nothing being due until delivery, or a question of lien, it is the same, in effect, as if the money were to be paid for taking the goods on board, &c., and as if it were not to be paid for carrying them.

The case of *Tamvaco* v. *Simpson* (1), in the Court of Exchequer Chamber, is in accordance with the case in the Privy Council.

The case of *Watson* v. *Shankland* (2) was relied on. It was an appeal from *Scotland.* There is great doubt whether the English rule as to prepaid freight applies in *Scotland.* If it does not, I should venture to think that prepaid freight is, in *Scotland,* a loan. If it does, I should venture to think that the advance, on such a contract as was proved in the case, was prepaid freight, and on that ground could not be recovered back. The decision, however, was, that, assuming the advance to be a loan, it could not be recovered back. If in the present case, which is to be decided according to English law, the advance could be treated as a loan, it might be necessary to consider that case with the utmost atten-

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(1) Law Rep. 1 C. P. 363.

(2) Law Rep. 2 H. L., Sc. 304.

H. L. (E.)
1876
ALLISON
v.
BRISTOL
MARINE
INSURANCE CO.

MR. JUSTICE
BRETT.

tion; but it was not argued in this case that the advance was a mere loan, and it would, as it seems to me, be impossible to hold that it was, without overruling all the cases on this subject, or the doctrine assumed in all which have been decided, since the time of *Charles* II.

I have drawn attention to all the cases, in order to shew how uniform the view has been as to what construction is to be put upon shipping documents in the form of the present charterparty, and as to the uniform, though perhaps anomalous rule, that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea, and cannot be recovered back after, if paid before the goods are lost by perils of the sea. Although I have said that this course of business may in theory be anomalous, I think its origin and existence are capable of a reasonable explanation. It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long a time out of money; and freight is much more difficult to pledge, as a security to third persons, than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and, for a consideration, took the risk in order to obviate a repayment, which disarranges business transactions.

It seems to me, and I submit that, on a review of all the cases, the true construction of the charterparty in this case is, that the £2000, which were to be paid and were paid in advance, constituted a prepayment of the freight payable under the charterparty, and no part of it could be recovered back by the charterer from the shipowner, and that the stipulation as to deduction for insurance did not alter this right of the shipowner. I do not understand that it is denied that the freight to be earned, and earned by the shipowner in this case, was £2 per ton on the amount of coal delivered at *Bombay*. Indeed, to hold otherwise would be flatly to contradict the charterparty. But it is suggested, and was held in the Exchequer Chamber, that the prepayment under such a contract is not in respect of the freight which is eventually earned, but of the freight which would be earned if the whole cargo should arrive and be delivered, so as to be a prepayment of so much per ton on every ton of the cargo shipped. Let this be tested on the assumption that no part of the advance can be paid back, which I submit is conclusively proved to be a correct assumption by the cases I have cited, and that there is no insurance by either party. Taking the figures of the present case, if 1000 tons are delivered, the freight earned is £2000; but the charterer could, upon the assumption, only affirm effectually that £1 per ton had been prepaid in respect of those 1000 tons; therefore he must pay the other £1 per ton, or £1000, for freight. The charterer will have paid £3000, and the shipowner will keep £2000, and receive £1000, or in the result have £3000. The one will in effect have paid, and the other have received, £3000 for the delivery, after transport, of 1000 tons. In effect that will be £3 per ton. If 500 tons are delivered, £500 are to be paid for freight; £2000 are to be kept; £2500 are in effect paid and received, or in effect £5 per ton. If 1500 tons are delivered, £1500 are to be paid for freight; £2000 are to be kept; £3500 are in effect paid and received, or in effect £2. 6*s*. 5*d*. per ton. The charterer, upon the assumption, must in effect pay more than £2 per ton in every case, except where the whole cargo is delivered. And if the shipowner is to pay back a part, then either a part is a mere loan, or money which is prepaid freight must be paid back, both of which views are contrary to all the cases. Whereas, on the contrary, if the amount of freight earned is set down according to the quantity of cargo delivered, and so debited to the charterer, and he is credited against it, as a whole, with the amount paid in advance, every word of the charterparty is satisfied, no word is contradicted, and nothing is done in conflict with any decided case. It follows that, in my opinion, the shipowner, the Plaintiff in this case, could not have claimed anything more from the charterer than the £2000 which had been prepaid; that the only freight which the Plaintiff had at risk was the balance, if any, of freight to be received at *Bombay*, if the ship with sufficient cargo arrived there; that the freight which was insured was that freight or balance of freight which was to be received at *Bombay* if the cargo should arrive safely, and lost if it did not, and that there was a total loss of such insured freight. I entirely agree with the judgment of Baron *Cleasby* in the Exchequer Chamber, and with the reasons given by him for it. I cannot

MR. JUSTICE BRETT.

agree with those judgments which, with great deference, seem to me to be rested on suggested equities between the charterer and shipowner which never existed, and on suggested equities between different underwriters, which, if they existed, should not be considered in this case.

I submit to your Lordships that the judgment of the Exchequer Chamber should be reversed. I answer your Lordships' question by saying that in my opinion there was a total loss.

My Lords, in this opinion my Brother *Pollock* agrees.

MR. JUSTICE GROVE.

MR. JUSTICE GROVE (read by Mr. Justice *Brett*):—

I agree with the judgment of the Court of Common Pleas, and that of Barons *Cleasby* and *Pollock* in the Exchequer Chamber. I can add nothing to the reasons given. I answer your Lordships' question by saying that in my opinion there was a total loss.

MR. JUSTICE MELLOR.

MR. JUSTICE MELLOR (read by Mr. Justice *Blackburn*):—

My Lords,—In answer to the question propounded by your Lordships to the Judges who attended the hearing of this case, I am of opinion that under the circumstances there was a partial loss only, and not a total loss of the subject matter of insurance. I expressed my opinion to that effect in the judgment which I delivered in the Exchequer Chamber (1), to which I venture to refer. I forbear to trouble your Lordships with any farther observation on the case, especially as I entirely concur with the opinion of my Brother *Blackburn*, expressed in the answer which he is prepared to give to the question propounded by your Lordships, to the effect that, under the circumstances of the case, the loss of the subject-matter of insurance was partial only.

MR. JUSTICE BLACKBURN.

MR. JUSTICE BLACKBURN:—

My Lords,—In my opinion there was only a partial loss of the subject-matter of insurance. My reasons for this opinion are as follows: Freight is the reward payable to the carrier for the safe carriage and delivery of goods; it is payable only on the safe carriage and delivery; if the goods are lost on the voyage, nothing is payable; and in cases where the freight is made payable at so much per ton of the goods, and part of the goods only are delivered, a proportionate part of the freight only is payable. But a sum of money payable by the shippers of the goods at the port of shipment does not acquire the legal character of freight because it is described under that name in a charterparty. It is, in effect, money to be paid for taking the goods on board and undertaking to carry, and not for carrying them. This, which I have taken, with a slight alteration, from the judgment of Lord *Kingsdown* in *Kirchner* v. *Venus* (1), in my opinion is an accurate statement of the law.

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(1) Law Rep. 9 C. P. 565.

A sum of money may be advanced as a loan on the security of the freight to be earned, and in such a case may be recovered back though the freight is lost; but I think it has always been held that a stipulation, which shews that the merchant is to insure the amount, is almost conclusive to shew that it is not a loan on the security of freight to be earned, but an advance of freight: *Hicks* v. *Shield* (2); *Frayes* v. *Worms* (3); and if it is an advance of freight, then by our law, differing in that respect from the law of some other countries, it cannot be recovered back in whole or in part, though the ship or the goods, or part of them, are lost, and consequently the freight is in whole or part unearned: *Byrne* v. *Schiller* (4).

Merchants, according to my experience, attach very great weight to a stipulation as to who is to insure, as shewing who is to bear the risk of loss; and I cannot doubt that both the Plaintiff and *De Mattos* perfectly understood that the sum paid on signing the bill of lading under this charterparty was an advance of freight, which was to be at the risk of the owner of the goods, and could not be recovered back though the goods were all lost; that it was in effect, to use Lord *Kingsdown's* language, not freight for carrying the goods, but money paid for taking the goods on board and undertaking to carry them. It might be insured by the owner of the goods either under the description of "prepaid freight" or as "the increased value of the goods by prepayment of freight," which latter form was adopted by *De Mattos* in this case.

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(1) 12 Moo. P. C. 390.
(2) 7 El. & Bl. 633. 3 Jur NS 715
(3) 19 C. B. (N.S.) 159.
(4) Law Rep. 6 Ex. 319.

Had the charterparty been expressed, "freight to be at 42*s.* per ton, one guinea to be paid on the right and true delivery, and one guinea in advance on signing bills of lading," there could have been no dispute about the matter. The loss of a certain number of tons would have caused the shipowner to lose a proportionate number of guineas, because his freight *pro tanto* was not earned; and would also have caused the goods owner, *De Mattos*, to lose an equal number of guineas, because he had lost the benefit of the number of guineas he had paid for the undertaking to carry his coals. The loss of each individual ton would have occasioned the same loss to each, and in the event that has happened of a loss of one half of the coals, there would be a loss of 50 per cent. on this policy on the freight, and also a loss of 50 per cent. on *De Mattos*' policy on "the coals, and increased value thereof by prepayment of freight."

The Defendants contend, and I think rightly, that on the true construction of the charterparty, the effect is the same as if it had been expressly stated as above.

But the Plaintiff puts a different construction on the charterparty. He contends that it was intended that the advance was to be against whatever freight was ultimately earned, and at the end of the voyage to be deducted from whatever freight was earned, and consequently that, though it was the goods owner's (*De Mattos*) risk in one sense, as it could not be recovered back in any event, yet the owner of the goods, *De Mattos*, was to lose nothing in respect of the prepaid freight, or the enhanced value of the goods, until half or more of the goods were lost. That the loss of the first ton of coals was a loss to the shipowners of two guineas of freight, and no loss at all of the money paid in advance, nor of the increased value of the goods, and that so it continued till half of the coals were lost, and then that the loss of each ton above the half would be no loss to the shipowner at all, but a loss to the goods owners of two guineas out of the money paid in advance. That, in short, under this charterparty the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight or enhanced value of the goods, did not commence till half the coals were lost.

Had the underwriters pleaded and proved that the insured did not disclose this peculiar nature of the charterparty making the risk double what in ordinary circumstances it would have been, that would have been a good defence. They have not so pleaded, and therefore we must act on the supposition (whether correct in fact or not I do not know) that the charterparty was disclosed, in which case, if the underwriters misconstrued it, it was their own fault. But, as already said, I do not think they have misconstrued it; and what is the true construction of the charterparty is really the matter in dispute in this cause.

It is very difficult to argue on the construction of such an instrument, or to do more than state one's view of what it means. The words are, "freight to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton on the quantity delivered," and had it stopped there, I think there would be no room for doubt that it meant 42*s.* per ton for each ton delivered, and nothing for those not delivered, so that a partial loss of the goods would be a partial loss of a proportionate part of the freight. But it goes on, "such freight to be paid, say, one half in cash on signing bills of lading, less" certain deductions, including 5 per cent. for insurance. That clearly expresses that 21*s.*, less these deductions, were to be paid for every ton put on board, without reference to whether it was all delivered or not, "and the remainder on right delivery of the cargo." I think that means the remainder of the 42*s.* per ton on the right delivery of each ton. Had the broker who drew up the charterparty adopted language similar to that used in *Byrne* v. *Schiller* (1), and said, "the amount paid on signing the bill of lading to be deducted from freight on settlement thereof," it would have clearly expressed what is now said to have been the intention. But in the absence of those or any similar words, I think that is not the meaning of the words used. The construction contended for by the Appellant seems to me forced and unnatural, and not that which mercantile men would put upon such a contract.

I do not like to make assertions as to what mercantile men would say, knowing as I do that other Judges would make contrary assertions; and we have very little to assist us in ascertaining what merchants really would think. I see that my Brother *Cleasby*, in his judgment in the Exchequer Chamber, attaches weight to the conduct of the master in delivering up the coals without payment of the 21*s*. per ton, as evidence of the understanding of merchants on the construction of the charterparty. And this was repeated on the argument at your Lordships' Bar. I am not sure that a legitimate argument as to the mercantile understanding can be deduced from the conduct of parties after the dispute has arisen, and in no case do I attach much weight to the conduct of the captain's seeking to charge underwriters, whom all captains are too apt to think their legitimate prey; I should myself attach more weight to the conduct of the insurance brokers who worded both policies as if they believed that the risk as to the freight and as to the enhanced value of the goods was the ordinary risk, subject to a partial loss on the loss of any part of the goods. Had *De Mattos* and his brokers thought that no part of the prepaid freight, which formed more than half of the value which he insured, was to be lost till more than one half of the goods had been lost, so as to render the risk as to this much less than the risk as to the goods themselves, he would, I should think, not have shaped his policy so as to lump these two unequal risks together. He would, I think, have severed the two in his policy, and have required that the premium for the smaller risk should be less, instead of insuring, as he did, as if his risk as to the enhanced value of the goods was the same as that on the goods themselves.

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(1) Law Rep. 6 Ex. 20, 319.

I have only farther to observe that the terms of the charterparty, "42*s*. per ton delivered, to be paid one half in cash on signing bills of lading" are exactly equivalent to saying "21*s*. to be paid on every ton put on board." If no disaster happened the number of tons delivered would be the same as the number of tons put on board; but I do not think it an accurate statement to say that the payment was to be one half of the estimated freight, which is the phrase used by each of the Judges in the Court of Common Pleas, and I cannot but think that a fallacy lurks under this, to my mind, inappropriate expression.

I have only to add, that where there has been such a difference of opinion on the question of what is the intention of the parties as expressed in this charterparty, it is impossible to say that the meaning is clear. It will appear different to different minds. I can only say that to me the intention appears to be to express that which the Respondents say has been expressed. And such being my opinion, I answer your Lordships' question by saying that there was only a partial loss of the subject-matter of insurance.

LORD CHELMSFORD :—

1876
March 30.

My Lords, this appeal is from the judgment of the Court of Exchequer Chamber, in an action brought by the Plaintiff on two policies of insurance to recover a total loss of freight. The Court of Common Pleas unanimously gave judgment in favour of the Plaintiff. The Court of Exchequer Chamber reversed that judgment by a majority of three to two, holding that there was only a partial loss of the subject-matter of insurance, and the learned Judges who have been summoned to assist your Lordships have differed in opinion; so that in the result there are five Judges in favour of the Plaintiff and four in favour of the Defendant. In this difference of opinion, it is impossible not to feel that the question is one of some difficulty. It appears to me to depend altogether upon the proper construction of the charterparty :—[His Lordship stated that instrument and the facts of the case.]

In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the bills of lading. Was it an advance in the nature of a loan, or was it a pre-payment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at *Bombay?* It is unnecessary to consider the case of *Kirchner* v. *Venus* (1) which was often referred to in the course of the argument, but which appears to me to have turned entirely upon the question of lien, so that the language used with respect to payments made by the shippers of goods at the port of discharge not acquiring the legal character of freight (2) must be received with some qualification. But this case is altogether removed from the authority of *Kirchner* v. *Venus*,

(1) 12 Moo. P. C. 361.

(2) 12 Moo. P. C. at p. 390.

because here the parties, by their charterparty, have agreed that the payment shall be the advance of half the freight, and that the shipowner shall have an absolute lien for freight. The charterparty contains a provision for the charterer to deduct from the payment of half freight 5 per cent. for insurance, and Mr. Justice *Blackburn*, in his opinion delivered to the House, stated "that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to shew that it is not a loan on security of freight to be earned, but an advance of freight." There can be no doubt, therefore, that the sum paid by *De Mattos* was a prepayment of freight, and as such, according to settled authorities, could not be recovered back again. That portion of the freight received by the Plaintiff was therefore never at risk on the voyage insured.

But then the question arises what was the portion of freight which was covered by this prepayment?

On the part of the Defendant it was contended that under the words of the charterparty the freight being payable not in a gross sum but after the rate of 42*s*. per ton of coals on the quantity delivered, the freight must be distributed over the whole cargo at the rate of 42*s*. for each ton, which will be equivalent to the payment of £1 1*s*. on every ton of the cargo put on board, leaving only £1 1*s*. to be paid for freight on the entire cargo delivered. If this mode of calculating the freight is adopted the Plaintiff's loss would of course be only a partial one.

But I am not disposed to take this view of the stipulation as to payment of freight in the charterparty. I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42*s*. per ton, and the part which was prepaid was assumed upon an estimate of half of that quantity. If the parties had intended that the prepayment should be calculated upon the footing of one half of the cargo, at so much per ton, nothing would have been easier than to have expressed this in words. The bill of lading was signed for 2178 tons, the half freight was to be paid on signing the bill of lading, and the receipt was indorsed on the bill of lading. If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained and the intention clearly expressed. The manner in which the half of the freight was agreed upon, satisfies me that the sum paid was taken generally as representing one half of the freight of the entire cargo, at the rate of 42*s.* per ton.

This being my view of the case, it follows that the Plaintiff never had more than half the freight as a gross sum at risk, on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight minus the £2286 already paid. In the event which occurred, he had secured himself against the loss of one half of the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the seas, and therefore his loss was a total loss.

I think the judgment of the Court of Exchequer Chamber ought to be reversed.

Lord Hatherley:—

My Lords, I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it.

The two points to be considered are, first, what is the insurance that has been effected by the policy and the subject-matter thereby insured; and we are led, in the consideration of that point, to the farther question as to what was the contract between the insurer and the person with whom he bargained, as the charterer of the ship, in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.

Now, my Lords, we must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject-matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject-matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the assured is endeavouring to effect a policy upon that which is at no risk whatever. Next, when we come to look at the contract itself, it being a contract of freight, we have to remember that from a very early period, as long ago, it was said during the argument, as the time of *Charles* II.—at all events for a very long time—it has been settled in our maritime law that prepaid freight cannot be recovered back. I think when we consider these two points, that on the one hand that is to be taken as insured which is at risk, and on the other hand that prepaid freight cannot be recovered back, we shall be led very easily and safely to the solution of the difficulty which appears to have arisen in the case before us.

We have now had the advantage of hearing the opinions of the several Judges, who, both in the Court below and afterwards in assisting your Lordships' House, have expressed their opinions upon the matter; and we have had the benefit of hearing the arguments upon which these opinions were founded, as well as the arguments which were adduced at the Bar. Therefore it may well be that a subject which has been one of considerable doubt, and has been supposed to be one of difficulty, before arriving at this stage of the argument, may without presumption on my part appear to me to be free from difficulty as regards the final conclusion we are bound to arrive at.

My Lords, in the first place the contract of insurance is an insurance of freight. The question is, what is that freight which is so insured? To answer that question we look at the charterparty which was entered into between the shipowner and the charterer; and that charterparty we find to be a contract or engagement on the part of the charterer, who was about to enter into the engagement with reference to a cargo of coals to be delivered at *Bombay*, that he will pay freight "on unloading and right delivery of the cargo, at and after the rate of 42*s.* per ton on the quantity delivered," neither more nor less. He is not to pay more freight than at that rate upon whatever may be delivered. That is the sum and substance of his engagement. But then as to the mode of paying the freight, he proposes to pay it in this way: instead of waiting until the time of delivery as regards the whole cargo, he engages that he will pay "one half in cash on signing bills of lading, less four months' interest." That is the discount, therefore, on the payment in respect of its being made at once, and before the period of delivery at *Bombay*. "Less four months' interest, and less 5 per cent. for insurance, and 2½ per cent., &c., in lieu of consignment at *Bombay*." That last 2½ per cent. we need not consider. Therefore it is less four months' interest and 5 per cent for insurance.

Now what seems to have grown up to be the practice in shipping transactions of this character is founded very probably upon the determination of the Courts of Law, that prepaid freight cannot be recovered back. What seems to have happened is, that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid during a long voyage being kept for a long time out of their money, have entered into an arrangement with the charterer to this effect: I shall wish to have my money in hand, to some amount at all events, upon this charter of freight; I therefore stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment; and I will give a farther rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it back in the event of there being a loss of the cargo, the risk becomes yours and not mine. What would ordinarily be the risk of the shipowner with regard to the freight so prepaid is transferred in this way to the charterer, and the shipowner has the money in pocket; and having the money in pocket, and seeing that it cannot be recovered back, he is assured of that—that is at no risk. Whatever loss happens at sea, he retains that money; and therefore, if there be a total loss of the whole cargo, the loss in respect of this prepayment of freight falls upon the person who has so prepaid it. Consequently a custom seems to have grown up of allowing a sum by way of insurance, in order to compensate the person making this prepayment for the risk he thereby runs, inasmuch as he cannot recover it back again if there be a total loss of the cargo.

That being so, my Lords, you find this state of things; as to a moiety of this freight the shipowner is quite safe; he cannot want to insure it, he has got it. But as to the other moiety, he is not safe as regards the perils of the sea, because if there should be a total loss, and if he should not be able to deliver any part of the goods, then he would get no more freight. He has got one moiety safe in his pocket; the other moiety is that which is at risk, and that he can insure. Therefore, when you look at the contract of insurance in this case, which we have here before us, and ask as to which of the moieties of freight the insurance is effected, the answer must be the shipowner has effected the insurance upon the unpaid moiety, which may be lost entirely to him. He cannot effect an insurance upon that which is at no risk; therefore he must be taken to have done that which only he rightly could do, namely, to have insured against that which is at risk—the other moiety of the freight, which may be lost to him in consequence of the perils of the sea.

On the other hand, what is the position of the charterer? It is this. He has agreed to pay 42*s.* per ton only on whatever is delivered to him; he has paid down to the extent of 21*s.* per ton; he can have only 21*s.* per ton more to pay if the whole of the cargo is delivered to him: but supposing there is no more delivered to him than the 21*s.* per ton would cover, what is then to happen? Why, he is entitled to say, you have delivered to me half the cargo; I was only to pay you, say £4000, for the 2000 tons of coal if you delivered the whole quantity; you have delivered to me, instead of 2000 tons, only 1000. I have paid you for 1000 already; that I have done, and I am not to pay more. Otherwise if you were to say (and this is the effect of the decision of the Court of Exchequer Chamber which your Lordships are now considering), that the charterer is to pay in respect of the half saved—that is, 1000 tons—he would be paying upon 3000 tons; or, to put it in pounds, to make the numbers easier, he would be paying £3 for every ton of coal delivered. Would he not have a right to say: You have delivered to me 1000 tons. I paid £2 per per ton on 1000 tons before the ship started, under the contract I entered into, and now you ask me for another £1 in respect of the portion of the coals which has been saved, there being only one half saved altogether; in that way you are making me pay £3 per ton for the coals delivered, as to which I entered into an engagement to pay you 42*s.* per ton and no more.

My Lords, when we look at the case in that simple way, it appears to me that the whole difficulty is at once solved. On the one hand you have the charterer saying: I am not to be compelled to pay more than I agreed to pay. On the other hand you have the other party insuring, not the freight he has got in his pocket, but freight that is still at risk, and which he may lose by the loss of half the cargo.

My Lords, having said this much I have very little more to add upon the subject. But with regard to the view taken by Mr. Justice *Blackburn*, for whose opinion I have the highest respect, as I have for any opinion of that learned Judge, it appears to me that he is under error, when, in advising your Lordships, he thus states the case. He says that the contention of the Plaintiff in the cause is this, "that in short, under this charterparty, the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight or enhanced value of the goods, did not commence till half the coals were lost." But, my Lords, as I said before, instead of being a total loss of freight to him he had got half the freight already in his pocket. No doubt when half the coals were lost he lost half the freight, but he had got the other half already in his pocket. I cannot conceive how by any process of reasoning on the one hand the shipowner can be taken to have insured what he had already got, or, on the other hand, how the charterer should be called upon to pay a higher freight than he had contracted to pay, namely, 42*s*. per ton.

I do not think that the case of *Kirchner* v. *Venus* (1) has any bearing upon the case before your Lordships. Of course any opinion of Lord *Kingsdown* is always cited by those who can cite it as an authority at all for their proposition, and it certainly carries with it great weight. But Mr. Justice *Brett*, whose opinion is of very great value, I think, in assisting your Lordships to arrive at a correct view of this case, dealt with *Kirchner* v. *Venus* (1) in the mode in which, in my opinion, it ought to be dealt with, and in which all judgments should be dealt with, namely, by taking it as applied to the subject matter. What Lord *Kingsdown* there says is this: in the first place, it is not that prepayments are not freight, but that they are not the same thing as freight, having all the legal incidents of freight; and, in the second place, there is the case of lien. Applying Lord *Kingsdown's* opinion to the

(1) 12 Moo. P. C. 361.

subject matter you will not find him saying that prepaid freight is not freight,—because it *is* freight to all intents and purposes. In settling the account you say, "That is a part of the freight," in this case and in every other case where freight comes to be adjusted. And what you find to be the course of shipowners and merchants dealing in this way with regard to the affreightment of vessels is this; the real transaction takes this form, the risk of so much as is prepaid is transferred to the charterer instead of being at the risk of the shipowner, the latter taking the money and keeping it in his pocket under all circumstances, whatever may happen. In respect of that an allowance is made for insurance. When you come to look at it in this point of view you see how this course of proceeding has naturally arisen. And, in truth, if we were to say that the Plaintiff had not insured this freight, which he has entirely lost, on account of the total freight earned not amounting to more than a set-off to the half that has already been paid, if we were to say that that was the result, we should, as it appears to me, disturb the whole of those contracts which are made in the form of the one we have now before us in this case, and which seem to have become tolerably frequent, we should be in effect saddling the charterer before us, with regard to what was the position between him and the shipowner, with a greater payment than any that he had contracted to make.

Some difficulty, no doubt, arose in the mind of one of the learned Judges in the Court below, Mr. Baron *Amphlett*, in consequence of the charterer having himself effected an insurance on the cargo of coals in the form of an insurance of the coals, value increased by freight prepaid; so that he said it appeared to him that the result would be to make the different underwriters (it might have been one underwriter, of course) by whom the insurance had been effected pay twice over in respect of this loss. Whether or not the underwriters could have resisted the claim I will not stop to inquire, because I think there is another answer to the argument. Mr. Justice *Brett* has pointed out that answer also, as he has dealt with almost every part of the case, very clearly. He says the insurance so effected was effected on a valued policy, and if there be any apparent lack of justice towards the underwriter with reference to recovering upon that policy, it

H. L. (E.)
1876
ALLISON
v.
BRISTOL
MARINE
INSURANCE CO.

arises from the law allowing these valued policies. This being taken as a valued policy, payment had to be made, although it might possibly be that the insurer's interest was not such as, but for the law allowing valued policies, could have been made the subject of contract with the underwriter.

My Lords, we have nothing to do with that here. All we have to do in the present case is to consider what is the engagement which the assured (here the Plaintiff) has entered into with those who have accepted the risk, and for that purpose to look at the contract which was entered into between him and the charterer; and when we look at that contract, the whole matter comes out plainly, that what is insured is exactly that which has been lost to him in consequence of the perils of the sea.

LORD PENZANCE:—

My Lords, the Appellant brings his action upon two policies of insurance, one on "freight valued at £2000," the other on "freight payable abroad valued at £2000;" and he claims a total loss. The answer of the underwriters is that the loss is only partial, as he might lawfully have claimed a part of the freight said to have been lost, from the charterer of his vessel, and whether he could do so or not depends on the terms of his charterparty.

There is, therefore, in substance but one question in this case —the proper construction of that charterparty as to the amount that became ultimately payable for freight in the events that happened.

It is admitted on both sides that freight was earned in respect of a quantity of coals delivered, to the extent of what may in round numbers be called half the cargo; but it is contended, on the one side, that as freight to that amount had already been paid in advance, there was nothing more for the merchant to pay; while it is contended, on the other, that the money so paid in advance was not *all* paid in discharge of such freight as might ultimately turn out to be earned, but was to the extent of a half only paid on that amount; and consequently that there still remained a quarter of the entire freight for the merchant to pay.

This latter view has been upheld by the Exchequer Chamber in the judgment now under appeal, and I am of opinion that it cannot be sustained.

I will test it, in the first place, by considering what results will flow from its adoption.

It is incontestable that if, in accordance with this proposition, the merchant should actually pay, in addition to the half freight previously advanced by him, another quarter of the entire freight, the result would be that the shipowner would have received three quarters of the entire freight, though he had earned only half of that freight by carrying half the cargo safely to its destination. This result is so startling and so irreconcilable, not only with apparent justice, but with all notions of freight as a payment earned and measured by the quantity of goods safely carried and delivered, that it challenges the closest attention to the proposition upon which it is based.

But it is, moreover, directly opposed to the actual language of the charterparty itself. It is impossible that the shipowner should receive this three-fourths of the entire freight for the carriage and delivery of half the cargo only, without doing violence to the express provision of the charter by which the amount payable for freight is defined. That provision is in these words: "The freight is to be paid at and after the rate of 42*s.* a ton on the *quantity delivered.*" There is no other provision in the charter defining the rate or amount of freight to be paid but this; and whatever time or times may have been, by other provisions, fixed for the payment of it, the amount itself is thus unquestionably fixed in plain language, admitting of no two interpretations, at 42*s.* a ton, calculated, *not on the number of tons put on board*, but on the number of tons *actually delivered.*

If, therefore, the shipowner be really entitled to receive not 42*s.* but 63*s.* a ton on the quantity delivered, it cannot be as freight earned under the charterparty that he does so, but it must be under some other and different kind of obligation created by that instrument. And accordingly the learned counsel for the Respondent, recognising this difficulty, ingeniously argued that though the advance of money made in this case was in the charterparty called "one-half of the freight," yet that it really was not freight at all, but something else; and cited expressions in other cases by which the sort of payment for which he was contending was variously described. I do not feel called upon to enter upon a review of those cases, because the decisions or expressions in them depended in each case upon the particular circumstances then existing, and because whether those decisions were justified or not upon those circumstances, the language to be found in this charterparty excludes, in my opinion, the possibility of affirming that the word "freight" (one-half of which was to be advanced) was intended to convey anything short of, or beyond, or different from its ordinary meaning.

In the first place, it is, I think, difficult to maintain when one and the same word is used several times within the short space of eight or ten consecutive lines of a written document, that it means one thing in one place and a totally different thing in another. Nothing but the absence of any other reasonable construction ought to lead to such a result. But if, in any case, it could be permissible to deal with a word so used in such a manner, it is, I think, impossible to do so in this instance, because the expressions of this charterparty in relation to this word "freight" are so bound up and connected together as to make it plain that the "freight" spoken of is one and the same freight throughout.

Thus the "freight" which is to be "paid one-half in cash," &c., is not spoken of generally as "freight," but is defined as "such freight." This word "such" refers the matter back to the only "freight" previously mentioned, and that is the "freight" to be paid at a certain rate on the "quantity delivered." The words that follow offer a farther proof that the thing of which "one-half" was to be "paid in cash," was the "freight" to be ultimately earned, for it is declared that the "remainder" (which must mean the other half of the same thing) is "to be paid on right delivery of the cargo." The mere grammatical construction therefore, of the terms in which the charterparty is framed forbids the supposition that there are two sorts of "freight" spoken of, or that there is anything intended by the word "freight" except that which is commonly known as such, and which is to be earned only on safe delivery.

It is not inconsistent with this that a part of what is thus to become due on delivery should, like any other payment due on a future day or event, be by special agreement made payable by anticipation at an earlier period, and the effect of such a payment when made is simply to create a credit, to that amount, in favour of the person making it, when the account is finally taken. The event upon which the right to freight is to accrue and its amount to be determined is one thing; the times at which it shall be paid is another. In this case a part of the payment is to be made by anticipation, but this is not inconsistent with the stipulation, in language perfectly unambiguous, that the entire amount of freight shall be calculated on the quantity delivered.

But then it is said a payment of freight in advance cannot be recovered back if the goods do not arrive; and that this has been held for good law in successive cases. This, at least, shews that such an advance is not unfamiliar either to the commercial community or the Courts of Law, and as to the injustice of it, the provisions of the present charterparty shew how easily and simply any injustice is practically avoided. An advance of freight is nothing more than an arrangement for the convenience of the shipowner who wants an advance and, if the merchant will make it, is willing to pay the cost of insuring the advance when made, thus practically taking upon himself in another form the risk which properly belongs to him of the freight never being earned at all.

It is no doubt true that it is impossible to know until the voyage is completed, and the cargo or such part of it as arrives in safety is delivered, what the actual amount due for freight calculated at the stipulated rate will turn out to be; and it is consequently impossible to calculate with accuracy, for the purpose of making the advance, what the half of that freight will amount to. But it is, I think, obvious enough that in speaking of "half the freight being paid in cash on signing bills of lading," the parties intended "half the estimated freight" calculated on the quantities in the bills of lading at the rate named in the charterparty.

The above mode of interpreting the charterparty, while it gives effect to the main and leading provision, that the entire freight shall depend on the quantity of goods delivered, treats the provision for an advance as meaning what it says, namely, as "freight to be paid one half in cash."

There seems little, therefore, to justify the conclusion that the shipowner could lawfully have demanded from the merchant a farther payment of freight, notwithstanding that an amount equal to all the freight which had actually been earned had been already paid to him.

But the most plausible form in which that proposition is maintained remains yet to be stated. It has been said that the true meaning of this charterparty is the same as if the words had run thus: "freight to be at 42*s.* a ton; one guinea to be paid on right and true delivery, and one guinea in advance on signing bills of lading;" thus splitting up the freight into separate sums of one guinea on each ton put on board, and a second guinea on each ton delivered.

But such a mode of translating the charterparty is only arrived at by *omitting the particular provision* upon which, in my opinion, the whole matter turns, namely, that the freight is to be calculated, not at "42*s.* per ton," as suggested, but at "42*s.* per ton *delivered.*"

This brings into a prominent light the real difference upon which the two opposite modes of reading the charterparty are based. The view now under discussion is based upon the proposition that the number of tons upon which the 42*s.* are to be paid is the number of tons put on board (half to be paid at once, and half on arrival), not the number of tons which are put out at the port of destination. The contention of the Appellant, on the contrary, is that the measure of freight intended is not the number of tons which the cargo may weigh when shipped, but the actual weight of the goods when they are delivered; although, for the purpose of making a money advance, a probable estimate of the latter must be made from the amount of the former. I have already pointed out that the Appellant has the express words of the charterparty in his favour on this point: "42*s.* a ton on the quantity delivered."

But there is another consideration, which appears to me to place the matter beyond doubt. It is very well known that, after a long voyage, even though the ship has met with no disaster, and the cargo has suffered nothing from "perils of the sea," the weight of the cargo, when delivered, will frequently differ, and sometimes very considerably, from its weight when shipped. There are various reasons for this, which apply variously to different species of goods and different voyages. There are some goods, for instance, which lose weight by leakage; others by evaporation; and others, again, by being contained in insufficient packages. Whether the weight, therefore, which is to be the criterion for calculating freight, is to be the weight when put on board, or the weight when delivered, cannot fail to be a matter of much importance.

Suppose, then, that a vessel under such a charterparty as the present one had carried her cargo to its destination free from "perils of the sea," but that the weight of the cargo had been found on delivery to have decreased from any of the causes to which I have alluded, so that each ton weight shipped was represented by, say fifteen hundredweight only, and the whole cargo thus reduced to three-fourths of its original weight, what would the merchant have to pay in such a case? He would have to pay, according to the contention of the Respondents, a guinea a ton on the three-fourths cargo which arrived, and would already have paid a guinea a ton on the original weight of the full cargo; so that, in the result, he would have paid, not "42*s.* on the quantity delivered" in accordance with the charterparty, but a guinea per ton in addition on the number of tons by which the weight of the cargo when shipped exceeded its weight when delivered. This would surely be placing a burden on the merchant which he could not have intended to assume when he stipulated that the entire amount of freight for which he was to be liable should be calculated, not on the quantity shipped, but on the quantity delivered.

It is also to be observed that this partial loss of his advance could not be covered by the merchant under any policy of insurance, for losses arising from any of the causes supposed are not caused by any of the perils insured against, and are not the subjects of marine insurance. And yet it is obvious that the sum allowed by the shipowner for premium of insurance was intended to keep the merchant free from risk.

Another reason against the adoption of this reading of the charterparty is, that it would establish a distinction between an aliquot part, such as a half, or a third, of the freight being paid in advance, and a lump sum of money, such as £500 or £1000, being advanced, as is frequently the case, in a similar manner. For it could hardly be said that in the latter case any particular sum was paid in respect of any particular part of the cargo.

One other argument only remains to be noticed. It has been said that the merchant in this case has, by the policy which he opened to protect his advances, entitled himself to recover £1 per ton in respect of the coal which was lost, over and above the value of such coal, and that if the Appellant's view of the charterparty be correct, this £1 per ton must be a profit beyond anything that he has lost—a result so inequitable that the Appellant's view of the charterparty must, it is argued, be mistaken.

The answer to this seems to me to be twofold; first, that the consequences of any contract entered into by the merchant with third persons can hardly affect the true construction of the contract previously entered into between him and the shipowner; secondly, that, on the assumption of the Appellant's view of the charterparty being correct, the merchant ought not, upon the common principles of insurance law, to be able to recover either £1 per ton, or any other sum, from the underwriters. For the first principle of insurance is indemnity, and when no loss of the subject of insurance has been sustained, there ought to be nothing to receive under a policy. If the merchant in this case has had the full value of his entire advance by setting it off against the freight actually earned, as the Appellant contends that he is entitled to do, he has suffered no loss in respect of that advance, and ought to have no legal claim for indemnity.

If, therefore, it be true (a question which I do not propose to discuss) that under the particular policy which has been effected in this case any such claim arises, it must be by reason of the special form of that policy, which I observe is a valued one, the result of which may be (as it is in many other cases) that the assured can obtain compensation beyond the amount of any loss which he has really suffered.

Upon the whole, therefore, I think it is clear that the Appellant could not have lawfully demanded from the charterer any farther freight beyond that which was covered by the previous advances; and consequently that he was entitled to claim of the Respondents a total loss under their policy.

The judgment of the Court of Exchequer Chamber ought, therefore, in my opinion, to be reversed.

LORD O'HAGAN:—

My Lords, the question in this case is a short one; but the remarkable difference of opinion amongst the learned Judges who have considered it, forbids us to regard it as free from serious difficulty. It arises really—extraneous and irrelevant matter being put out of account—on the construction of a single document, which is common and familiar in its form. We have to decide on the effect of the charterparty, which was executed between the Plaintiff, a shipowner, and Mr. *De Mattos*, the charterer of the ship. And for that purpose we are not much assisted by authority, although many cases have been cited in the progress of the argument. We must deal with the document itself, having regard to the circumstances in which it originated and the relations of the parties to it, and endeavouring to give a fair interpretation to its words, according to their natural and customary meaning.

The question arises, as I have said, on the construction of the charterparty, and not on the policy, which is the direct foundation of the suit, but will be operative for the Appellant or the Respondents, according to the view we take of that construction. And, for the right ascertainment of it, I do not think that your Lordships are at liberty to travel into considerations, *dehors* itself—which have been pressed upon the House. For instance, we cannot properly consider the dealings of the charterer with other parties, or reach a conclusion with reference to the character of this contract with the owner, because the charterer effected an insurance which might have given him a return beyond the value of his coal. It was *res inter alios acta*, and though his profit might be excessive, the owner had nothing to do with that, and knew nothing about it. If he chose to insure for more than the goods were worth, on a valued policy, and found people willing to accept the risk for an adequate consideration, such a proceeding cannot control or qualify an arrangement wholly unconnected with it.

Putting out of account all such irrelevant suggestions, I shall ask the attention of your Lordships for a very short time to the words of the charterparty. It provided for the loading of a full cargo of coal for *Bombay*, freight to be paid on unloading and right delivery of the cargo, at and after the rate of 42*s.* per ton of 20 cwts. "on the quantity delivered," and it went on, "such freight to be paid, say one half in cash on signing bills of lading, ... and the remainder on right delivery of the cargo, less loss of coals," &c. I omit words repeatedly read, which seem to me not material for the purpose of the argument.

The question is, half of the cargo having been lost by perils of the sea, and half duly delivered at *Bombay*, and the owner having received payment for the carriage of one half of it, had he any farther claim upon the charterer, or was the money received in *England* applicable to discharge the freight which had been earned at *Bombay?* The captain thought it was, and delivered the cargo without claiming any farther freight, and the Plaintiff brought his action on his policy as for a total loss. I think he was warranted in doing so, and is entitled to recover. I should add, that in the receipt for the freight paid by the charterer, it is described as "the sum of £2286 10*s.*, being advance of half freight on within shipment."

It seems to me that the purpose of the charterparty is very clear. It was to secure to the owner an integral freight for the voyage; the amount of which was approximately fixed according to the value of the coals to be put on board and intended to reach *Bombay;* but it was to be paid half in advance on signing bills of lading, and the remainder on right delivery of the cargo. What was the risk against which the owner insured? What was the purpose of his insurance?

He received half of the freight; and having received it, it was his absolutely, and was irrecoverable under any circumstances by the charterer. This peculiar doctrine of the English law is abundantly established by *De Silvale* v. *Kendall* (1), *Byrne* v. *Schiller* (2), and many other cases, to which full reference is made in the able opinion of Mr. Justice *Brett*. The owner had thus got prepayment of a moiety of the entire debt which the charterer had contingently incurred for the hire of the ship, or a portion of it, and which might be described, reversing an ordinary legal phrase, as "*Debitum in futuro, solvendum in præsenti.*" That prepayment was applicable generally to the freight, which, although a single liability, had been divided for the purposes of convenience into the "one-half" of it, and "the remainder" to be dealt with in different ways and at different times. And when, by the perils of the sea, the owner has been disabled from fully completing his part of the contract, and failed to earn more than "the one-half" by delivery at *Bombay*, that being the express and essential condition of the charterer's liability, the prepayment became applicable to answer the only demand he could maintain, the charterer owed him nothing, and he fell back properly on his policy for "the remainder" of the freight which, not having earned it according to his bargain, he was unable to demand from the charterer.

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(1) 4 M. & S. 37.

(2) Law Rep. 6 Ex. 20; Ex. Ch. 319.

This appears to me to be a reasonable view of the matter, and the terms of the charterparty justify, I think, no other. The only thing at risk was the unpaid balance, and when that was hopelessly and totally lost, the liability of the insurer was complete.

There has been much discussion as to the meaning of the word "freight" in the charterparty, and it has been represented as having been in the nature of a loan or of a payment, not for the carriage of the goods, but for the taking of them aboard the vessel and agreeing to carry them. But I see nothing to warrant the adoption of such a view. "Freight" has a definite meaning. It is described by Mr. *Phillips* (1), in a passage cited by Chief Justice *Bovill*, as signifying "the earnings or profit derived by the shipowner or hirer of the ship from the use of it himself or by letting it to others to be used, or by carrying goods for others;" and by Lord *Tenterden* in *Flint* v. *Flemyng* (2), as importing "the benefit derived from the employment of the ship." In this charterparty "freight" surely means nothing else. It is "the profit to be derived by the shipowner" on the delivery of the cargo, at the end of the voyage, for "the use of the ship, in conveying the coals of the charterer." I agree with the clear words

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(1) Chap. III. sect. 2.

(2) 1 B. & Ad. 45.

H. L. (E.)
1876
Allison
v.
Bristol
Marine
Insurance Co.

of Baron *Cleasby* in the Court of Exchequer Chamber: "We cannot depart from the settled meaning of the word 'freight' and the meaning expressly given to it in this charterparty, namely, the amount to be paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight" (1).

The charterparty speaks, first, of "freight" generally as to be paid "on unloading and right delivery," and it is "such freight" which it afterwards divides into the "one half" and "the remainder." Why should we strive to put an unnatural and unaccustomed meaning on an ordinary word which is accepted by the parties as it is commonly understood, when they give and take a receipt for the money paid, not as a loan, or a payment for putting the cargo on board, or for accepting the goods without delivery, but as being "advance of half-freight on within shipment," plainly pointing to an entire freight on the entire cargo to be fully or partially earned and paid on the full or partial delivery of that cargo at *Bombay*.

Reliance has been placed on some expressions of Lord *Kingsdown* in *Kirchner* v. *Venus* (2), in which he states that "freight is the reward payable to the owner for the safe carriage and delivery of goods," and that "a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight, because it is described by that name in a bill of lading." Any opinion of Lord *Kingsdown*, even an *obiter dictum* like this, is entitled to high consideration, and I do not think it at all necessary to impeach the correctness of his words for the purpose of sustaining the view I am submitting to your Lordships. Immediately after using them he goes on to recognise the right and the power of those who enter into shipping agreements "to supersede by a special contract the rights and obligations which the law attaches to freight in its legal sense," and that, even assuming the accuracy of his definition, seems to me exactly what the parties have done in the present case. They have

(1) Law Rep. 9 C. P. 574.

(2) 12 Moo. P. C. 390.

made a contract which unmistakeably deals with the prepayment as of "freight" and nothing else; and whatever might have been the legal force of the term if it stood by itself, and without the specific directions as to the "one half" and "the remainder," those directions equally give to both the character of "freight," although the first half is to be paid before delivery. So that I do not conceive the *dictum* of Lord *Kingsdown* to be adverse in reality to the contention of the Appellant.

And that contention, on this particular point, is strongly sustained by several cases, to two of which I shall briefly advert. In *De Silvale* v. *Kendall* (1) a charterparty provided that the charterer should pay "for the freight and hire of the vessel, a specified sum in advance," and "the residue on the delivery of the cargo." The provision in that instrument was substantially the same as that with which we are dealing, and it was contended there, as here, that the advance was not freight, but in the nature of a loan. And there Lord *Ellenborough* said: "If the charterparty be silent, the law will demand a performance of the voyage, for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words sufficiently intelligible to that end, that a part of the freight (using the word 'freight') should be paid by anticipation, which should not depend on the performance of the voyage, may they not so stipulate?" Every word is applicable to the circumstances of this case; and, as Lord *Ellenborough* insisted on deciding on the terms of the charterparty before him, and declined to consider other cases applying, as he said, "to other forms of covenant," so I think your Lordships may safely found your judgment upon the express words of this particular contract. In that case, also, the Judges held expressly that there is no doubt of the competency of parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. So, in *Byrne* v. *Schiller* (2), the latest case bearing on the present, the charterparty provides that a vessel has to be sent on a voyage at a specific rate of freight, "such freight," as here, to be paid partly in advance and "the remainder on right delivery of the cargo at the port of discharge." And then the Court dealt with the payments as "on account of freight." The circumstances of those cases make the observations of the Judges directly applicable to the case before us, and they and others shew also that a stipulation to pay freight in advance and before delivery is not only legal, but of common use amongst commercial people.

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(1) 4 M. & S. 37.

(2) Law Rep. 6 Ex. 20; in Ex. Ch. 319.

I might have been disposed to dwell on the inconvenience possible to arise in a case like this from the adoption of the view of the Respondents. It would plainly involve, in certain circumstances of insufficient delivery, from any cause, serious loss to the charterer, which it would be difficult to suppose him to have designed or contemplated as just and reasonable, but this point has been so well put by my noble and learned friend who last addressed the House that I shall not occupy time by dwelling upon it. I am satisfied, with much deference to the adverse view which has been so strongly supported, that, on the construction of the charterparty alone, the Plaintiff is entitled to recover; and I prefer to base my opinion on that sufficient ground.

I think the judgment of the Exchequer Chamber should be reversed.

LORD SELBORNE:—

My Lords, the difficulty in this case (for certainly I felt some difficulty during the argument, and it has been the subject of much difference of opinion between Judges of high authority) arises out of the peculiar rule of English mercantile law, that an advance on account of freight to be earned, made at the commencement of a voyage, is, in the absence of any stipulation to the contrary, an irrevocable payment at the risk of the shipper of the goods, and not a loan repayable by the borrower if freight to that amount be not earned.

The authorities referred to by Mr. Justice *Brett* certainly establish this general rule (whether reasonable in the abstract or not); and it must be taken that payments in advance, such as that which was made by the charterer in the present case, are in this country generally made and received, as between the parties to contracts of affreightment, upon this understanding.

It is, however, remarkable that none of the authorities seems to touch the precise question in this case, viz., whether the charterer, under a contract like that before your Lordships, has a right to deduct the whole amount paid by him in advance from any freight which may actually be earned in case of a loss of part of the cargo; or whether such advance ought to be apportioned over the whole cargo delivered on board, so that the loss of a proportionate part of it will fall upon the charterer if part of the cargo is lost. In that case it does not seem to me to be material, or to create any difficulty in the application of the principle, whether the advance is of an aliquot part of the estimated freight or of a gross sum of money.

Mr. Justice *Blackburn*, if I understand him rightly, thinks that on principle the latter view is that most consistent with the rule established by the authorities, and that there is nothing in the express contract between these parties to justify a different conclusion. The actual settlement between the shipowner and the charterer did (indeed) take place upon the opposite view; but the insurer was no party to that settlement; and what was done *inter alios* could not enlarge his liability. It may be that the principle on which that settlement proceeded was according to a general usage of trade; but of this I find no proof. I am by no means clear that the reasoning of Mr. Justice *Blackburn* is fully met by the observation of Mr. Justice *Brett*, that if this be not the correct principle, "the charterer must *in effect* pay more than £2 per ton in every case except where the whole cargo is delivered." If the whole cargo is lost, he must "in effect" pay £1 a ton on the goods put on board, though under the contract no freight whatever has been earned. The introduction of the words "in effect," when the question is as to the legal consequences of an anomalous rule not expressed in terms by the contract, may perhaps be fallacious.

On the other hand, the conclusion of Mr. Justice *Blackburn* rests entirely upon the ground that in a contract so worded as the present, a stipulation tantamount to that expressed by the words, "the amount paid on signing the bill of lading to be deducted from freight in settlement thereof," ought not to be implied if it is not expressed. I am unable to adopt that opinion; and, upon the whole case (though I should have thought it more satisfactory if there had been some authoritative source of information as to the usage of trade) I think that the view of the proper construction and effect of such a contract taken by the majority of the learned Judges and by your Lordships, is the more reasonable, and that which is most in accordance with the natural meaning of the words of the charterparty, and with the probable intention of the contracting parties. If so, there was clearly, in this case, a total loss of the whole interest of the assured in the whole subject-matter of the insurance; and the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

Judgment of the Court of Exchequer Chamber reversed, and judgment of the Court of Common Pleas affirmed.

Lords' Journals, 30th March, 1876.

Solicitor for Appellant: *William Nash.*
Solicitors for Respondent: *Argles & Rawlins.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
May 4.

THOMAS W. RHODES . . . . PLAINTIFF IN ERROR;

AND

GEORGE P. FORWOOD AND WALTER PATON . . . . DEFENDANTS IN ERROR.

Contract—Agency—Control over Property—Principal—Sale of the Subject of the Agency.

5QBD579

Where two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.

A. and *B.* agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as *A.* should continue to carry on business at the town of *L.*, *A.* should be the sole agent at *L.* for the sale of *B.*'s coals, and that *B.* would not employ any other agent at *L.* for that purpose. There were stipulations in the agreement that *B.* should have the entire control over the prices for which, and the credits at which the coals were to be sold; and that if *A.* could not sell a certain amount per year, or *B.* could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, *B.* sold the colliery itself. In an action by *A.* for damages for breach of the agreement, thereby occasioned:—

Held, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to *L.*

ACTION for damages for an alleged breach of contract.

Rhodes was the owner of the *Risca Colliery, Forwood & Paton* were brokers in *Liverpool*. The declaration set forth an agreement dated the 24th of September, 1869, of which the material parts were the following: "In consideration of the services and payments to be mutually rendered," it was agreed: 1. "For the term of seven years from the 1st day of November next Messrs. *Paton & Forwood*, or such one of them as shall continue to carry on business in the name of that firm at *Liverpool*, shall and will be the agents of Mr. *Rhodes* at *Liverpool* for the sale of the coals of all kinds produced at the *Risca Collieries*, subject nevertheless to the determination of such agency in manner hereinafter mentioned.

H. L. (E.)
1876
RHODES
v.
FORWOOD.

2. During the continuance of such agency Mr. *Rhodes* will not employ any other agent for the sale of coals in the port of *Liverpool*, save in respect of contracts now existing, all of which are expressly exempted from this agreement. 3. That the rates at which coal is to be sold, and all special terms with respect thereto, and the purchasers, and amount of credit in the case of sales other than for cash, are to be subject to the approval of Mr. *Rhodes*, as are also the rates to be charged for shipping or delivery of coals. 4. That Messrs. *Forwood & Paton* will not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. *Rhodes*, to be obtained for each transaction." By the 5th article, the commission was fixed at £3 per cent. to include all the charges to be incurred by the agent. 7. "That in case during the first or any subsequent year of the agency hereby created, reckoning from the 1st of November to the 1st of November, Messrs. *Forwood & Paton* shall not have, *bonâ fide*, sold 50,000 tons of coals on Messrs. *Rhodes*' account, in conformity with the terms of this contract, it shall be lawful for Mr. *Rhodes* at any time prior to the 1st day of May in the ensuing year to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect" . . . "and in the event of Mr. *Rhodes* not being able to supply with due dispatch the quantity and quality of coal, not exceeding 75,000 tons in all, in any one year, which may have been sold on his account in conformity with the terms of this contract, (saving in the case of strikes and inevitable accidents), it shall be lawful for Messrs. *Forwood & Paton* in like manner" to determine their agency.

The agreement was acted upon by the parties until the 1st of March, 1873, when the Defendant contracted to sell the *Risca Colliery*, and the vendees took possession of it on the 22nd of that month, and from that time the Plaintiffs had ceased to be employed in the sale of the coals.

Forwood & Paton having brought their action on the agreement, it was referred to a barrister, who stated a case for the opinion of the Court. Upon argument in the Court of Exchequer, judgment was given by Mr. Baron *Bramwell*, and Mr. Baron *Cleasby*, for the Defendant *Rhodes*. Upon Error to the Exchequer

Chamber, that judgment was reversed by Lord *Coleridge*, Mr. Justice *Lush*, and Mr. Justice *Archibald*. *Diss.* Mr. Justice *Quain*. The case was then brought up on Error to this House.

Mr. *Benjamin*, Q.C., and Mr. *Patchett*, for the Plaintiff in Error:—

The fact that the agreement provided one particular mode of putting an end to it when certain circumstances should occur, did not prevent the parties from determining it under all other circumstances. There were several matters not provided for in the contract. *Rhodes* was not bound to send all or even any of his coal to *Liverpool*. If he found a market elsewhere, at which he could get a higher price, he might send all the produce of his colliery to that more profitable market; so, under the words of the articles themselves, he was entitled to regulate the prices and the terms of credit on sales, and by either of these means he might really have put an end to the agency. The only stipulation was that if he sent coals to *Liverpool* for sale he was to employ *Forwood & Paton* as his agents to sell them. The stipulation as to seven years referred to that and to no other matter; he was not bound to work his mine at all, if it appeared that he could not work it except at a loss—and if so, the principle of his own advantage applied in the other case, and, as he might leave off working his mine, he might sell it and get rid of it altogether. The case of *Burton* v. *The Great Northern Railway* (1) is entirely in favour of this construction of the contract, and *Ex parte Maclure, In re the English and Scottish Marine Insurance Company* (2), is directly in point. There, a person engaged to act as agent for the insurance company for five years at a fixed salary, and also on a commission of 10 per cent. Before the five years expired the company was wound up, and he was held not entitled to prove against the company for the loss of his commission during the remainder of the term. Here *Forwood & Paton* might cease to carry on business at *Liverpool*, and that would put an end to the contract; *Rhodes* was equally entitled to put an end to it by selling his colliery.

(1) 9 Ex. 507.

(2) Law Rep. 5 Ch. Ap. 737.

Mr. *Manisty*, Q.C., and Mr. *J. C. Bigham*, for the Defendants in Error:—

This was a valid agreement for employment in a lawful business. It was made for the term of seven years absolutely; during that period *Rhodes* bound himself to employ *Forwood & Paton* as his agents at *Liverpool* for the sale of all his coals raised from the *Risca Colliery;* during that period they bound themselves to act as his agents at *Liverpool*, to act for him and no one else. The agreement professed to be made "in consideration of the services and payments to be mutually rendered." That the contract was intended to be a valuable one was shewn by the fact that if the agents did not sell at least 50,000 tons of coal in a year, or if *Rhodes* did not supply, if they were sold, up to 75,000 tons in a year, the contract might be determined by a six months' notice. But it was only to be determined on notice, and for a matter expressly agreed upon. That shewed that it was intended to be a continuing contract—that is, continuing up to the end of the time mentioned at the commencement of it. Neither party had a right to put an end to it at his mere pleasure by rendering himself unable to perform it. The cases cited have no application to the present. In *Burton* v. *The Great Northern Railway Company* (1) the Court held that the contract as set out in the declaration was not proved, and that in truth it was only a unilateral contract, which certainly was not so here; and in the case of *Maclure* (2) the company did not wilfully break the contract, but became by law incapable of performing it. It was true that to *Rhodes* was reserved the power to control the prices, and also the credits at which the coals were to be sold, but he could not do that *malâ fide*, nor could he *malâ fide* send his coals to another market, and avoid sending them to the market of *Liverpool*. In *Stirling* v. *Maitland* (3) an insurance company had entered into an agreement with *C. D.* to appoint him an agent for insurances at *Glasgow*, jointly with *A. B.*, and undertook to pay *C. D.* a certain sum if *A. B.* should be displaced. The company transferred its business to another company, wound up its affairs, and dissolved; it was held that this was a displacing of *A. B.* which enabled *A. B.*

(1) 9 Ex. 507.

(2) Law Rep. 5 Ch. Ap. 737.

(3) 5 B. & S. 840.

11 Jun 1852/8.

H. L. (E.)
1876
RHODES
v.
FORWOOD.

to recover. Lord Chief Justice *Cockburn* there said (1): "I look on the law to be that, if a party enters into an arrangement that can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the engagement can be operative;" and he added that it would have been different if the company had come to an end from other and external circumstances. That principle must govern this case. *Rhodes* engaged that the agents should be his sole agents. [LORD O'HAGAN:—"At *Liverpool*."] Yes, and they put themselves under a corresponding obligation. Under such circumstances *Rhodes* was not entitled to disable himself from the performance of his contract. The state of facts under which the agreement was made, continuing, *Rhodes* was bound to continue to perform it, and is responsible in damages if he does not. Here *Forwood & Paton* stipulate, not only that they will act as brokers for *Rhodes* for the sale of the *Risca* coals, but they will not act as brokers for any one else. That was a valid consideration for a binding promise on his part. They had to incur a large expense in enabling themselves to fulfil their part of the contract, and it cannot be contended that as soon as they had done so, he might sell his colliery, and so deprive them of all means of reimbursing themselves. That argument would in truth amount to saying that there was no contract whatever. Such a thing as the sale of the colliery was never thought of by either party when the contract was made, and, therefore, no positive stipulation was introduced concerning it. But there can be no doubt that at that time both parties expected and intended that the contract should endure for the full term of seven years. The only matters on which the contract could be terminated were specially provided for. *McIntyre* v. *Belcher* (2) exactly applies here. That was a case where *A.* sold to *B.* his practice as a surgeon. *A.* was to introduce *B.* to the patients, and to receive for the first four years one-fourth part of the gross annual earnings, provided they did not fall below £300. *B.* discontinued the practice, and it was held that he could not lawfully do so, for that there was an implied contract to keep it up, and an allegation in the declaration that by

(1) 5 B. & S. 852. 11 Jur NS. 218 / 220

(2) 11 C. B. (N.S.) 654; 32 L. J. (C.P.) 254. 10 Jur NS. 239.

H. L. (E.)
1876
RHODES
v.
FORWOOD.

"his own acts and defaults" he had disabled himself from performing his agreement, was held properly to set forth the cause of action. The principle there was broadly stated by Lord Chief Justice *Erle*, and was in accordance with the opinion he had always expressed on the subject of such an agreement (1). Even in the case of *Churchward* v. *The Queen* (2), where the great difficulty arose upon the action of the Parliament, Lord Chief Justice *Cockburn* said (3) that though a contract might appear to be binding only on one party, there must be "corresponding and correlative obligations" on the other; and that was so here.

By the provision affecting the termination of the contract upon notice, it may be that the Plaintiffs would be bound to refrain from acting as agents for any other coal owners during a period of many months, and in that respect they might suffer serious damage.

Mr. *Benjamin* was not called upon to reply.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, I do not think that any of your Lordships can have any doubt as to the decision which the House ought to give in the present case. The case itself lies in an extremely short compass. As regards its general history it may be stated thus:—There is a colliery owner in the south of *Wales* who is anxious to place the produce of his colliery in the most advantageous way, and to obtain a sale for the coal taken from it in the *Liverpool* market, as well as in other places. He enters into an agreement with certain gentlemen in *Liverpool*, the present Respondents. I shall have to refer a little more particularly to the details of that agreement afterwards, but the outline of it is this, they are to become his agents for the sale of the coal sold in *Liverpool* for a period of seven years; during that time he will not employ any other agent in *Liverpool* to sell his coal, and, during that time, they will not act as agents without his consent for the sale of any other steam coal: they are to be paid a price for their services by a percentage upon the value of the coal sold, and for that price they are to undertake all the expense, of an office, and of advertising and commending the coal to purchasers, which may have to be incurred in *Liverpool.*

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(1) See his opinion in *Beckham* v. *Drake*, 2 H. L. C. at p. 607.

(2) Law Rep. 1 Q. B. 173.

(3) Ibid. 195.

My Lords, the employment commences upon that footing, and the case finds clearly that the Respondents were at considerable expense in bringing the coal into the *Liverpool* market, and before the notice of purchasers. As a matter of course that expense would naturally be incurred to a greater extent in the earlier part of the term of seven years than in the later part. The employment therefore during the earlier part of the seven years would naturally be expected to be less remunerative than during the later part of that period. The employment went on for about three years and a half. At the end of that time the Appellant sold his colliery, and therefore of necessity no more coal could come to the *Liverpool* market with regard to which he would be the principal and the Respondents his agents. That, of course, was a very considerable hardship upon the Respondents for the reason that I have mentioned. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But although that is a hardship upon them which naturally one would regret to see occur, still the question remains what was the contract entered into between the parties, and has there been, in what has been done, any violation of that contract?

My Lords, it is not contended that there has been any violation of any express term in any part of the contract. There is no express term in the contract from beginning to end that the Appellant, the colliery owner, would send any coal to *Liverpool,* or any particular quantity of coal to *Liverpool,* or that he would continue for any particular length of time to send coal to *Liverpool.* As regards express contract, there is a complete absence of anything of that kind.

But then it is contended that there is an implied contract under which the Appellant was bound to send coal to *Liverpool,* and that he has disabled himself from performing that implied contract by selling the colliery out of which the coal might have come. My Lords, that requires your Lordships to look at the whole contract, and to discover, if you can, whether there is any such implied contract as is suggested.

Now the general effect of the contract is this: Your Lordships will observe that it commences in this way, that "for the term of seven years" "*Paton & Forwood*, or such of them as shall continue to carry on business in the name of that firm at *Liverpool*, shall and will be the agents of Mr. *Rhodes* at *Liverpool* for the sale of the coals of all kinds produced at the *Risca Collieries*." I stop there for the purpose of saying that that obviously is, and indeed it was admitted to be, not a contract that they would be the agents of *Rhodes* for the sale of *Risca* coal of all kinds whereever the sale should take place, but that they would be the agents for the sale in *Liverpool* of such of the coal as was sold in *Liverpool;* and, farther, that it is obviously a contract that they will be the agents of *Rhodes* for the sale of coal which is produced at the *Risca Colliery* while the *Risca Colliery* is his property, because if it is the property of another person they could not be the agents of *Rhodes* for the sale of coal which did not belong to *Rhodes*.

Farther than that, the contract is that they will thus be the agents of Mr. *Rhodes* for seven years with this important qualification, "Subject nevertheless to the determination of such agency in manner hereinafter mentioned." You are therefore informed at the commencement that although there is a fixed term stated, namely, seven years, means are provided in a subsequent part of the contract for terminating the agency.

Then there are two engagements, one upon the side of *Rhodes* and the other upon the side of *Forwood*, and they are the only two express engagements which I find in the contract. With regard to *Rhodes*, the express engagement on his part is in the second clause, "During the continuance of such agency, Mr. *Rhodes* will not employ any other agent for the sale of coals in the port of *Liverpool*, save in respect of contracts now existing, all of which are expressly exempted from this agreement." That is all which he actually and openly contracts for. He ties his hand against having any other agent for the sale of coal in the port of *Liverpool*. The express contract on the part of *Forwood, Paton, & Co.* is in the fourth paragraph: "*Forwood, Paton, & Co.* will not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. *Rhodes* to be obtained for each transaction." It is a correlative contract on their part, negative also in its aspect, that, as he will not employ any other agent, so they will not act for any other principal. Now I ask your Lordships at this point to consider if the contract had stopped here, what would have been the result? Both parties would have been tied and bound for seven years, the one not to employ another agent, the other not to act for another principal.

Then it appears to have occurred to them, naturally enough, to consider—but what if the agency produces no fruit to the agents? Or what if the agents are not able to act with the energy which the principal expects? Is this state of things to go on for seven years in this case? And then to deal with that your Lordships find that the 7th clause is introduced, providing that if "during the first or any subsequent year of the agency hereby created" *Forwood, Paton, & Co.* shall not have *bonâ fide* sold 50,000 tons of coal on Mr. *Rhodes*' account, in conformity with the terms of this contract" (that is to say, sold at prices of which the principal would approve) "it shall be lawful for Mr. *Rhodes*, at any time prior to the 1st day of May in the ensuing year to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect." And on the other hand, "in the event of Mr. *Rhodes* not being able to supply with due dispatch the quantity and quality of coal not exceeding" (not 50,000 tons but) "75,000 tons in all in any one year which may have been sold on his account in conformity with the terms of this contract, (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. *Forwood, Paton, & Co.* in like manner to determine their agency." Therefore, there is not an absolute contract to employ no other agent during seven years, and an absolute contract to act for no other principal for seven years, but a contract of that kind subject to determination in the manner mentioned, the mode of determination being that which I have read, a power to the principal to resile if his agent cannot sell at prices approved by him 50,000 tons of coal in the year, and a power to the agent to resile if the principal cannot supply him in any year with 75,000 tons of coal which can be sold at those prices.

That is the protection which the parties have provided for themselves with reference to the duration or the continuance of this agreement. Now I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what, it is admitted, is not found expressly there, namely, an engagement that during that time the principal will not disable himself from sending coals to *Liverpool* by selling his colliery to any other person? This question is asked by Mr. *Manisty:* Can you assume that the agents intended to leave open the right to sell the colliery without any assent on their part? My Lords, I should ask, in answer to that, another question. Can you assume that the principal, the colliery owner, meant to tie his hands for seven years against selling the colliery without either obtaining the consent of the agents, or without paying them a gross sum, the equivalent for all the profits they might make by the continuance of the engagement during the seven years? My Lords, if it was the intention that there should be an implied undertaking of that kind, how inconsistent would that have been with the express clause which I have read, the 7th clause, providing expressly in the events which are there mentioned for the determination of the agreement.

Now, my Lords, as I pointed out in the course of the argument, there are really in this agreement several risks which are left altogether uncovered, and as to some of which it was very candidly admitted by the counsel for the Respondents that no provision whatever was made, and that they could not say that there was even by implication any protection against those risks. I will remind your Lordships of what those risks are. On the one hand, in the first place, the colliery owner, the Appellant, might sell the whole of his coal at ports other than *Liverpool* and not send a single ton to *Liverpool.* That is admitted on the part of the Respondents. They do not challenge that proposition. They say that that is an infirmity in the engagement between the parties. The agents could not have demurred or complained if every ton of this coal raised during the seven years at the *Risca Colliery* had been sold at *Swansea,* or at *Southampton,* or at any other port which might be suggested. In the next place, the coal might have been sent to *Liverpool*, but the principal might have taken a view with regard to the price to be obtained for it which would have led him to place limits upon the coal, such as to prevent the agents selling any of it in any one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to hold the coal and wait for better prices. There, again, it is admitted that that was in the power of the principal, and that the agent could not have complained. Then, again, I asked the question: Supposing the colliery owner had, by reason of difficulties arising with the workers or otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times or a more easy mode of working, could the agents have complained? It was said they could not; that the colliery owner must be the judge of that. He might have taken that course without exposing himself to any proceedings for damages.

But if that is so, if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched at *Liverpool* might have been such that the coal could not have been sold even after it went to *Liverpool*,—if all that was in the power of the colliery owner, and it could not be contended that there is any provision in this contract against any of those risks, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner, not selling his coal elsewhere piecemeal but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no undertaking at all against any of the other risks?

My Lords, in point of fact an agreement of this kind, obviously, is made upon the chances of risks of the sort I have referred to, and none of which is expressed in the agreement. That which is in the mind of the parties, the principal on the one hand and the agents on the other, is, supposing it to be convenient that the business should go on and the coal find its way to the port of *Liverpool*, all that we require to stipulate for is that, on the one hand, the principal should have the security that his agents will

H. L. (E.)
1876
RHODES
v.
FORWOOD.

be sufficiently energetic to sell a certain quantity of coal in the year, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put in their hands for sale, to terminate the engagement. My Lords, it is obvious, now that the result is seen, that it would have been a much wiser thing if both parties, or at all events if the agents, in place of stipulating for a mode of terminating the agreement which required to work it out the lapse perhaps of a year or eighteen months, had stipulated for a more speedy power of terminating the agreement, and for the power of taking coal for other people as agents, supposing the coal of the *Risca Colliery* was not sent to them. That, however, was for them to judge of. Your Lordships cannot reform an agreement because in the result it appears to produce consequences which possibly may not have been expected.

The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated, can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery entire. Therefore I am obliged to arrive at the conclusion that the decision of the Court of Exchequer was correct, and that judgment in the action should be given as the Court of Exchequer gave it, for the Defendant.

LORD CHELMSFORD:—

My Lords, the question to be determined is, whether the agreement upon which the action is brought involves an implied agreement on the part of the Defendant that he will continue to carry on the *Risca Colliery*, and to employ the Plaintiffs as his agents at *Liverpool* for the sale of the coals of all kinds produced at the *Risca Colliery*, absolutely during seven years. It is conceded that there is no express agreement to this effect; and the question is whether the sale of the collieries during the seven years is a breach of the agreement, the breach in the declaration being that the Defendant before the expiration of the seven years disabled himself from any longer carrying out the agreement.

Mr. Justice *Lush*, in his judgment, says: "There is not a phrase or a word which implies that the agency is to cease if the Defendant chooses to sell the colliery while it is a working concern. Whether this was an inadvertent omission or an intentional one is beside the question. Probably such an event was not contemplated. It is sufficient, however, to say that it is not provided for, and therefore the contract remains binding as it would have been if the Defendant had continued to hold the colliery."

Now, with great respect to the learned Judge, how can an intention not in the contemplation of the parties be implied to have existed? There is no doubt that at the time of entering into the agreement both parties contemplated the continuance of the agreement for seven years; that the one would continue to carry on business at *Liverpool,* and that the other would be the possessor and continue to work the *Risca* collieries; and upon this expectation they provided for the determining of the contract, in the then existing state of things, by the owner of the colliery if the agents did not sell, in any year, 50,000 tons of coal, and by the agents in case the owner did not supply 75,000 tons in any one year. This may be called the mode of actively determining the contract.

But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relation of the parties should absolutely continue for seven years, it ought to have been provided for, and not being provided for, it cannot in my opinion be taken to have been intended.

It was conceded that the Plaintiff in Error was not bound to send his coals to *Liverpool.* By sending them elsewhere he would voluntarily disable the agreement itself; what difference, in point of effect, can there be in him disabling himself from performing it by parting with the colliery?

I agree that the judgment of the Exchequer Chamber should be reversed and judgment entered for the Defendant.

LORD HATHERLEY:—

My Lords, I entirely concur in the views which have been expressed by the noble and learned Lords who have preceded me.

It appears to me, as it did to Mr. Justice *Quain* in the Court of Exchequer Chamber, that when you peruse this whole agreement you find an ordinary agreement of agency, and of agency alone.

The Plaintiffs in the original cause being engaged in business at *Liverpool*, and the Defendant in the original cause being the owner of a colliery, the Plaintiffs present themselves to him, and the first stipulation which is contained in the agreement on their part is this—that for the term of seven years they, "or such of them as shall continue to carry on business in the name of the firm at *Liverpool*, shall and will be the agents of Mr. *Rhodes* at *Liverpool* for the sale of the coals of all kinds produced at the *Risca Collieries*." In that part of the agreement there is no engagement by Mr. *Rhodes*—the engagement there is by the Messrs. *Paton & Forwood*, as persons who are ready to perform the duty of agency at *Liverpool*. In other words, they say: Here are we for seven years ready and willing to perform the duty of selling your coals produced at the *Risca Collieries*. That agency might be determined in the manner which has been alluded to, and which is expressed on the face of the agreement, either by the expiration of the seven years, or by the disappearance from the firm of all the then partners in it.

Then, on the other hand, Messrs. *Forwood & Paton* having entered into that engagement, Mr. *Rhodes* says: You having said that you will be always ready and willing to act as my agents for seven years, I will not, for the time that you are so, employ any other agents at *Liverpool* for the sale of coals coming from the *Risca Collieries*. He reserves to himself the full right to sell his coals anywhere else, and he also reserves, by the third clause, the sole control over the price of the coals, the mode of effecting sales, and the terms. The sales are to be subject in fact to the approval of Mr. *Rhodes* in all respects. Messrs. *Forwood & Paton* are merely agents so long as he retains the sole control over his property in the coal and over the disposition of it. There is no allegation on the part of the Plaintiffs of anything in the shape of *mala fides* on the part of Mr. *Rhodes* in anything that he had done. The ordinary sales were made by him of his property at the times when he thought it beneficial to make such sales. And it is also not now contended that there is anything in this agreement to prevent Mr. *Rhodes* from selling his coals elsewhere than in the port of *Liverpool,* as he may think fit, of course *bonâ fide,* and not with any special view of evading this agreement. On the other hand, the Messrs. *Forwood & Co.* engage (and that was greatly relied upon in the Court of Exchequer Chamber) that during the continuance of this agency they will not "act as agents for the sale of any other steam coal without the written consent of Mr. *Rhodes* to be obtained for each transaction."

Now my Lords, it appears to me that when you have read as far as those four clauses you have a very clear and complete agreement. Afterwards it is true there is the seventh clause, which is very important, upon the whole, in the consideration of the case, regard being had to the arguments which have been adduced on the part of the Plaintiffs; still in those four clauses you have a very clear and complete agreement. Messrs. *Forwood & Co.,* on the one hand, say: We are standing here for seven years holding ourselves ready to act as your agents for the sale of your *Risca* coal, and engaging ourselves during that time to sell the same quality of coal, namely, steam coal, for nobody else; Mr. *Rhodes,* on the other hand, says: As long as I have *Risca* coal to sell (that is the effect of it) nobody else but you shall sell it, at *Liverpool,* but I must have the fixing of the prices, and I must have the full power of selling it at such other ports as I may think fit. It would be a singular undertaking to introduce by implication into that agreement that he would never during a period of seven years dispose of the colliery itself. Why is there anything more reasonable in implying—on the contrary, is it not much more unreasonable to imply—such a provision as that he would deprive himself for seven years of the power of selling his colliery than that the engagement on the part of Messrs. *Forwood & Co.* to act as agents was meant to continue only so long as he continued to be the owner of the colliery? The latter seems to me a much more reasonable supposition than the former. The one party says: We are engaging to sell for you, Mr. *Rhodes,* your *Risca* coal, of course implying that whilst so acting as your agents we are selling for you in the capacity of the owner of that coal, and when you cease to be the owner of it we shall cease to be agents. The case has arisen in which the agency is necessarily

H. L. (E.)
1876
RHODES
v.
FORWOOD.

by the force of events terminated; but to imply such a proposition as this from the agreement, that because other persons have said to you: We are content to act as your agents, and will stand ready and willing for seven years to be your agents; therefore you have engaged not to deal with your own property for that period—seems to me a far more forced interpretation than that of simply inserting a clause like that which I have referred to.

This view of the agreement is very much strengthened by the 7th clause, which shews that they did contemplate possible reasons for the parties being dissatisfied on both sides with the working of the agreement, and wishing to absolve themselves from the binding efficacy of it, that even everything else being the same, they might still wish for other reasons to determine the agreement. For that purpose experience was required to enable them to judge of its working. Accordingly they provide, if you on the one hand find by experience that we are such slow agents that we cannot dispose of 50,000 tons of coals to your advantage, you may determine it; and if we, on the other hand, think that we are such active agents as to be able to dispose of 75,000 tons a year, and you cannot supply us with the quantity, then we may determine it.

The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject matter of the agency is gone. The subject matter of the agency has disappeared without *mala fides* on either side. Therefore the contract is brought to an end by the course of events—by that happening which might necessarily have been expected to happen, and which would have the effect of putting an end to the contract. It was as entirely open to anticipation that the contract of agency might be concluded by that event, as that it might be concluded by the operation of the 7th clause. There are three or four other kinds of contingencies, as the noble and learned lord on the woolsack has observed, which are unprovided for.

My Lords, it appears to me that all that has happened is this: the parties meet together, and they assume as between themselves the probability of a certain state of things existing, but they do not enter into a guarantie that that state of things shall continue to exist. As was well observed (if I may say so) by the Lord Chief

H. L. (E.)
1876
RHODES
v.
FORWOOD.

Justice in *Stirling* v. *Maitland* (1), if you find that a certain state of things, which existed at the date of the contract, is necessary in order to give the contract any effect at all, you may no doubt, acting with due care and caution in such cases, imply an agreement that that state of things shall exist, because otherwise no effect could be given to the contract. But here very full effect could, as it appears to me, be given to the contract in the way in which it has been given by the original decision of the Court of Exchequer, and I am of opinion that that decision should stand, and that the judgment of the Court of Exchequer Chamber should be reversed.

LORD PENZANCE :—

My Lords, I desire to say but a very words upon this case, agreeing entirely as I do in the way in which this question has been dealt with by the noble and learned Lords who have preceded me. The case resolves itself really into a very simple one, and one which, independently of the special terms of the contract, may be, and probably is, a case that is arising in many other trades and businesses, and in many other individual cases besides the present.

A principal who wants to have a portion of his business transacted in *Liverpool*, or in any other town, engages an agent, and they enter into a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal. They enter into other stipulations as to prices, as to commission, and so forth, but the substance of the agreement is such as I have mentioned. Upon such an agreement as that, surely, unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as a matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent, and the commission that he may receive. I say that in a contract of that kind there ought to be some special obligation, otherwise the natural reading of such a contract would be that, as long as the principal chooses to carry on his business, and

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(1) 5 B. & S. 840, at p. 852. 11 Jur N.S. 220

H. L. (E.)
1876
RHODES
v.
FORWOOD.

as long as he chooses, as here, to carry on that portion of the business which consists of sales of coals at the particular port, he shall be bound to employ the person with whom he has agreed as his agent for such sales, but that he shall be at liberty, when he likes to put an end to that business, to do so.

But, my Lords, in this case the sort of obligation or condition which is asked by the Plaintiff to be implied is of a most singular character, because he does not contend that the principal is bound to carry on the business for his, the agent's, profit. He does not contend that the principal is obliged to continue to send the coal to *Liverpool;* but he says: Although it is quite true that you are not bound to carry on your business in such a way as to give me any profit whatever, because you are not bound to raise coal, and, if you do, you are not bound to send it to *Liverpool*, yet I maintain that there is implied somewhere in this contract an obligation that you will keep possession of this colliery. For what purpose? What possible interest has the agent in a condition, that although the principal is not bound to send coal to *Liverpool* at all, and so put any money into the agent's pocket, still the colliery shall remain the property of the principal? It seems to me, therefore, my Lords, that the contention of the Plaintiff in the present case does not go far enough. He ought to have gone at least to the extent of saying: The nature of your bargain was such that I had an interest in it as well as you. You had an interest in selling your coal, I had an interest in obtaining my commission, and you cannot put an end to that business in *Liverpool* without damaging my interest. But he does not say that; he forbears to say that. He admits that the principal might, in the variety of ways that have been indicated by the noble and learned Lord on the woolsack, have so acted that the agent would have obtained no benefit whatever from the agreement. But he says: I maintain that there is an implied condition that, although I get no benefit out of it, nevertheless you shall keep yourself possessed of the colliery. My Lords, I confess I am quite unable to find any terms in this contract from which such an obligation can be implied, and I cannot conceive that the intention of the parties was, or that they would have had any interest in its being, that such an obligation should be created.

H. L. (E.)
1876
RHODES
v.
FORWOOD.

I wish to say a few words upon the case of *McIntyre* v. *Belcher* (1). It was a case in which a medical man bought a business, and was to pay a portion of the profits that he should make from it. After he had bought the business he ceased to carry it on, and, therefore, the seller lost a portion of what was practically the agreed price for which the business was sold. The Court held that there was an implied obligation on the part of the Defendant that he would go on working at the business in order to make those profits; and I think no one can deny that that was a decision quite in accordance with justice and with law. But that surely was a very different case from the present. There the bargain was for a definite payment out of the profits to be earned by the Defendant as part of the price of the thing which had previously been sold to him. Here the bargain is for an agency to be carried on for the mutual benefit of *Forwood & Paton*, and *Rhodes*, the selling prices of the coals to be sold being at the sole discretion of *Rhodes* himself. Therefore, instead of its being a payment for something gone by, the bargain is, that if the business is carried on, *Forwood & Paton* shall get a certain benefit out of it. It seems to me, therefore, my Lords, that that case not only does not apply in the present instance, but that the principle contained in it very well illustrates the great difference there is between the present case and all cases in which the Court has held, in the language which was very aptly quoted by Mr. *Manisty* from Lord Chief Justice *Cockburn* (2), "that the Defendant is bound to continue a state of things which is necessary to the carrying out of his own contract."

I wish to add one more word upon a suggestion which has been made, that the agents here might be bound for eighteen months not to act for anybody else, notwithstanding that *Rhodes* had in the meantime sold the colliery. The question, whether they are so bound, does not arise in this case, but I should be sorry to affirm the proposition, that when the Defendant had sold the colliery, and had, therefore, practically entirely put an end to the agency, the Plaintiffs were still bound not to act for any one else, for I find the terms of the contract upon that subject are these, that Messrs. *Forwood & Paton* "will not, during the continuance of their agency, act as agents for the sale of any other steam coal." If the Defendant by selling the colliery had put an end to the agency, it might perhaps be very successfully contended that the other party was at liberty to act for other coal proprietors. But that point does not arise in the present case, and, therefore, I desire only to speak negatively, and not to express an affirmative opinion upon it at present.

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(1) 11 C. B. (N.S.) 654; 32 L. J. (C.P.) 254. 10 Jur. N.S. 239

(2) *Stirling* v. *Maitland*, 5 B. & S. 840, at p. 852. 11 Jur. N.S. 220

On the whole, my Lords, I think the judgment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of Exchequer affirmed.

LORD O'HAGAN:—

My Lords, with such hesitation as is made reasonable by the difference of opinion amongst the learned Judges in the Courts below, I fully concur in thinking that the decision of the Court of Exchequer Chamber ought to be reversed. The question is merely as to the construction of the contract; and I can add little of value to the argument already presented to your Lordships by the noble and learned Lords who have preceded me.

The terms of the instrument appear to me fairly to indicate the intention of the parties that whatever coals might be sent by the Defendant, at his own option, from his mine to *Liverpool* should be sold there by the Plaintiffs, as his agents, for a proper commission; but not at all to import, according to the contention of the Respondents, that the Appellant should for a period of seven years deprive himself of the power of disposing of his own property,—whatever might be the inducement, the interest, or the necessity. I think that the words in themselves are not naturally and fairly open to this latter construction; and the consequences of such an interpretation seem to me so unreasonable and inconvenient as to incline us to repel it, even if the matter, on the reading of the words, was in a condition of doubt.

As in most cases of the kind, we are little assisted by authority. Judicial decision on one contract can rarely help us to the understanding of another; and, dealing with that before us within itself, regarding the relative position of the parties as throwing light upon its meaning and upon their real purpose; and remembering the admission at the Bar that the Appellant was at liberty to sell his coals in other markets besides that of *Liverpool*, I approve the view adopted by the Court of Exchequer, which is commended, as I have said, by many considerations of consistency and convenience not to be found in that to which it is opposed. I find it hard to believe, that the parties meant to leave the agents at liberty at any time to escape their responsibility by selling their business (which they might have done under the very words of the contract), whilst the principal was to be bound, under all circumstances, to hold his colliery for seven years in order that these agents might earn their commission. I think the admission of the Defendant's right to sell the entire produce of his colliery in other markets, or to cease the working of it, or to put upon his coal prices making it unsaleable, and so to take all profit from the agents in *Liverpool*, practically involves, also, the admission of his right to dispose of the colliery itself, with precisely the same result of loss and disappointment to the Respondents. I think it difficult to hold that the Appellant, who had carefully reserved to himself control over his coal by regulating the rates of sale, and the special terms of it, should have debarred himself, for so long a period, from exercising over his property the more important authority of realising its value, however profitable and desirable the assignment of it might be.

I have said, that there is no case ruling or much affecting the question before us. But I shall refer your Lordships to a passage in the judgment of your Lordships' House in the case of *Shaw* v. *Lawless* (1), which indicates the hesitation felt by the noble and learned Lords who pronounced it, in assuming, without a very clear expression to that effect, the purpose of a devisor to control the right of a devisee in dealing freely with his own property.

In that case Mr. *Shaw*, having made a devise for life, and directed the purchase of real estates, declared his desire that his executors should retain Mr. *Lawless* as agent in the receipt of the rents at the usual fees. The words of the will were held not to create a trust in favour of Mr. *Lawless*, the Lord Chancellor *Cottenham* observing, "What is the subject in the present case? It is the right to be employed in the receipt of the rents and the agency and management of the land of the devisee upon the

(1) 5 Cl. & F. 129, at p. 155.

usual fees. What is the necessary effect of this alleged right? It goes to exclude *Shaw* from the management of his own estate or from the receipt of the rents themselves!" And in a previous part of his judgment he says, "When your Lordships see to what extent, and I might almost say to what absurd extent, this construction of the will necessarily leads, you cannot hesitate in coming to the conclusion that it is at least very doubtful how far this could possibly have been the intention of the testator." And so, in this case, I more than hesitate to believe that the intention imputed to the parties by the respondents could really have been entertained by them.

Looking to these considerations, and the plain words of the instrument itself, I believe the conclusion to which your Lordships have arrived is well justified, and will carry into effect the true purpose of the contract.

Judgment of the Court of Exchequer Chamber reversed; and judgment of the Court of Exchequer affirmed.

Lords' Journals, 4th May, 1876.

Solicitors for Appellants: *Bridges, Sawtell, Heywood, & Ram.*
Solicitors for Respondent: *Chester, Urquhart, Mayhew, & Holden.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1875
July 30.

[BEFORE THE LORDS' COMMITTEE FOR PRIVILEGES.]

BELHAVEN AND STENTON PEERAGE.

CLAIM OF JAMES HAMILTON OF STEVENSTON.

CLAIM OF LIEUT.-COL. HAMILTON OF THE GRENADIER GUARDS.

Circumstantial Evidence.

Remarks of THE LORD CHANCELLOR (1) shewing that in considering circumstantial evidence *all* the circumstances must be examined and compared to establish the required elucidation.

Help afforded by opposing Criticism.

In dealing with circumstantial evidence, the Court derives much aid from the opposing criticisms of counsel.

THE Scottish peerage of *Belhaven* and *Stenton* was created in 1647 by *Charles* I., with descent to heirs male. The eighth baron was *Robert Montgomery Hamilton*, who dying in 1868 without issue, the question of succession arose between the above contending claimants, whose petitions to the Crown were referred by Her Majesty to the House of Peers, and by the House to their Lordships' Committee for Privileges.

Mr. *Charles Scott*, Mr. *Rolland*, Mr. *Laurie*, and Mr. *McAlpin*, appeared as counsel for the claimant *James Hamilton* of *Stevenston.*

Mr. *Fleming*, Q.C., and Mr. *John Pearson*, Q.C., for the claimant Lieutenant-Colonel *Hamilton;* and

The *Lord Advocate* (2) and Mr. *Badenoch Nicolson*, for the Crown.

At the close of the examination of witnesses, and of the argument by counsel, the Lord Chancellor (1) remarked that the case turned entirely on circumstantial evidence as to the pedigree of the above competitors.

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(1) Lord *Cairns.* (2) Mr. *Gordon*, Q.C.

With reference to circumstantial evidence in general, his Lordship made the following observations :—

THE LORD CHANCELLOR :—

My Lords, in dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand, you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

I feel peculiar satisfaction in thinking that your Lordships have not here to decide merely upon the case of one claimant; you have not to decide simply upon the case of *James Hamilton* claiming to be the heir by the elder line, but you have the very great advantage of a skilful contradictor and antagonist, who is able with the best advice to bring to bear an amount of wholesome criticism which must always be applied to a question of circumstantial evidence before any satisfactory conclusion can be arrived at.

After thus expressing himself, his Lordship next proceeded to examine with much care and with great elaboration the evidence in the case adduced by the respective claimants, with the arguments of the learned counsel on both sides—arriving, as his Lordship did, at the conclusion, that *James Hamilton* of *Stevenston* had established his claim to the peerage of *Belhaven* and *Stenton*.

LORD HATHERLEY concurred with this opinion, holding that the case depended entirely upon circumstantial evidence, some of which was obscure and complicated, and ranging over a century and a half of family history.

THE CHAIRMAN (1) and the other Members of the Committee for Privileges came to the resolution that " the claimant *James Hamilton* of *Stevenston* had made out his claim to the title, honour,

(1) Lord *Redesdale.*

H. L. (Sc.)
1875
BELHAVEN AND STENTON PEERAGE.

and dignity of Lord *Belhaven* and *Stenton* in the peerage of *Scotland.*" This report from the Committee was agreed to by the House, and an order was made that the resolution should be laid before Her Majesty by the Lords with White Staves, and transmitted to the Lord Clerk Registrar of *Scotland*—and it was further ordered that the Lord *Belhaven* and *Stenton* should take his proper place at the future meetings of the peers of *Scotland.*

Agent for the Crown: *Hugh Hope.*
Agent for the successful Claimant: *Andrew Gillman.*
Agents for Lieutenant-Colonel *Hamilton: Grahames & Wardlaw.*

[HOUSE OF LORDS.]

TENISON EDWARDS AND WIFE . . . APPELLANTS; H. L. (E.)

AND

1876

A. B. WARDEN AND OTHERS AND THE SECRETARY OF STATE FOR INDIA . } RESPONDENTS.

March 30, 31; *April* 4, 7.

Bombay Civil Service Fund—Statute of Limitations—Interest—Trustees.

A Fund was established at *Bombay* by the covenanted civil servants of the *East India Company* serving in that Presidency, for granting pensions and annuities to members, their widows and children. By the original articles certain persons were appointed managers, and they were declared to be "the trustees of the Fund," and the property was vested in them:—

Held, that they were not mere trustees for the association, but "trustees" properly so called, and that the members of the fund were the beneficiaries, so that the defence of the *Statute of Limitations* could not be set up against a claimant on the Fund, merely on account of lapse of time.

There was a rule of the institution that required a claim to be made and particulars of the claim to be fully stated:—

Held, that, till such claim was made as required, the trustees did not come under any liability.

Payments were to be made annually to certain persons who were entitled to annuities chargeable on the Fund:—

Held, that where such persons had, by their own conduct, occasioned the non-payment of the annual sums, they were not entitled to interest on those sums for the time during which they had so occasioned the non-payment.

A fund was provided for the maintenance of the widows and children of members of an association, and one of the rules was that there should be an allowance to a widow of £300 a year, but that if she possessed property exceeding £200 a year independent of the institution, the allowance should be reduced in such amount as her property might exceed that sum, so that her pension, together with her property, should not exceed £500 a year. A member of the Fund left a widow and daughter; he bequeathed to his daughter a sum of £6000, with a direction that the income should be paid to the widow till the daughter came of age. When the daughter did come of age, the widow claimed to receive the difference which she had lost by the happening of that event, so as to bring up her income to £500. The trustees of the Fund declined to recognise this claim, asserting that when a bequest was made by a member of the Fund, the property left should be considered as the property of the widow and family collectively:—

Held, that this decision of the trustees was incorrect, and that the widow was entitled to have the deficiency in her income (occasioned by her daughter becoming absolutely entitled to the bequest), made up to her out of the Fund.

Other resolutions were afterwards agreed to by which additional benefits were to be given to widows and children of members of the Fund, the members being allowed an option to perform or decline the conditions on which such benefits were offered. A member accepted his annuity under the original regulations, but did not then, or at any time during his life, perform or offer to perform these new conditions. Some years after his death his widow declared her readiness to perform them, and claimed the additional benefits thereby to be obtained:—

Held, that she was not entitled to make this claim.

THIS was an appeal against an order of the Lords Justices which had reversed a decree of Vice-Chancellor *Bacon*, and also against a part of that decree itself. Mrs. *Edwards* was the daughter of Mr. *Thomas Flower*, and the administratrix of his widow, her mother, Mrs. *Flower*. The Respondents were the "trustees" of the *Bombay Civil Service Fund*. The Secretary of State for *India* represented the late *East India Company*.

In the year 1804, many of the civil servants of the *East India Company* formed themselves into an association for the purpose of assisting those of their number who might be compelled from ill health to resign their service in the Company, or whose widows and children might be left unprovided for by their death in the service. The directors of the *East India Company* looked favourably on the scheme, and assisted it. The third article of the deed of institution declared that "the committee of managers for the time being shall be trustees of the Fund." To the original scheme was soon added the object of providing annuities for those who, after a certain number of years' service, should desire to retire from it. The subscriptions to the fund were originally optional; the East Indian Government received them, paid an interest of £8 per cent. on the money so received, and contributed to the Fund an annual sum of £2800. In April, 1825, the constitution of the Fund was remodelled; it was divided into the Annuity Branch and the Provident Branch—the subscription to it was made compulsory on all the *Bombay* civil servants—the Company's contribution of £2800 a year was appropriated to the Annuity Branch, for the benefit of which a levy of £4 per cent. was fixed on all salaries and emoluments; and for the benefit of the Provident Branch a levy of 1 per cent. on the same. The retiring annuities which had been before fixed at £400 a year were increased to £1000 a year, capable of being taken by all members of the Civil

H. L. (E.)
1876
EDWARDS
v.
WARDEN.

Service retiring after twenty-five years' service and twenty-two years' residence in *India*, on condition, however, that if the accumulated value of the retiring member's contributions to the Fund, with interest, amounted to less than half the value of his annuity he should pay the difference. The original provision for the widows and children remained unaltered; it was only to be given to those who were not adequately provided for. Those persons who had become members of the Fund before it was thus remodelled had the option of continuing their membership of the old institution, or of coming in under the new rules. By the 11th article of the rules, the widow of every member of the Fund was to be entitled to a pension of £300 a year, but if she had other property her pension was to be reduced proportionably, so that the income should not exceed £500 a year.

The 14th section (Article IV.) of the Rules of April, 1825, declared that no decision affecting the resources or expenditure of the Fund should be final until sanctioned by the Court of Directors of the *East India Company*. Article VI. sect. 4, provided for members changing from the Old Fund to the New Fund; and sect. 5 declared that those who dissented from the New Fund should be considered as remaining members of the Old Fund, under the regulations in force before the remodelling, that is, before the 1st of May, 1825.

The affairs of the Fund were to be under the management of a committee of nine members, called the "trustees of the Fund," in whom the property of the Fund was vested.

Mr. *Thomas Flower* was a civil servant in the *Bombay Presidency* at the institution of the Fund, was an original subscriber, and in 1825 assented to the new rules.

In September of that year a meeting of the subscribers was held, and Mr. *Farish* proposed certain resolutions: First. That the pensions now granted to widows and children not otherwise provided for, should be granted to them without the restriction which then existed as to the effect of a widow having other property. Secondly, that to entitle a member to this benefit for his family, after he shall have accepted his annuity, he should subscribe £1 per cent. per annum on that annuity, or pay £1 per cent. on the total value of the annuity. These propositions were agreed to by the meeting, but their operation was suspended till the assent of the directors should be given. Mr. *Farish's* propositions were for a long time under the consideration of the Court of Directors, but they were finally assented to in September, 1829, and the assent formally communicated in January, 1830. At a meeting of the subscribers held on the 8th of June, 1830, the amount of percentage on the annuity was increased to £2 per cent. Acting, however, in the spirit of the early resolutions of 1825, an annuity of £1000 had been offered to Mr. *Flower* on the 26th of June, 1829. He accepted it, and in December, 1829, left *India* for *England* upon furlough. On the 1st of May, 1830, he formally retired from the service. On the 24th of May, 1830, a statement of the amount of fine due by him on the basis of his acceptance was sent by the secretary of the Fund to his agents in *England;* his acceptance of the annuity was notified to the annual general meeting on the 8th of June, 1830. Mr. *Flower* died on the 11th of February, 1834, having paid all the money which entitled him to his annuity, but never having paid or offered to pay any additional subscription to the Fund so as to entitle himself or his widow to the benefit of Mr. *Farish's* final resolutions.

Mr. *Flower* left a widow and a daughter (now the wife of Mr. *Edwards*), and by his will bequeathed a sum of Rs.60,000 (£6000) to his daughter, to be paid to her on her attaining twenty-one, until which period the interest was to be paid to her mother for her maintenance and education. This was done.

A letter was addressed by Mrs. *Flower* to the trustees of the Fund, on the 11th of March, 1838, requesting to be informed what was the amount payable from her husband's estate, in order that she might, by paying it, entitle herself and her daughter to the benefit of Mr. *Farish's* later resolutions. This letter did not contain any statement that her husband during his lifetime had offered to make the payments referred to in it. On her claim being submitted to the subscribers at large, it was not admitted.

Fresh resolutions as to the management of the Fund and payments from it were passed in 1840. These were, in substance, that the widow's title to a pension should not be affected by her possession of property; that that provision should be extended to those widows, then on the fund, whose husbands were alive and in the service on the 1st of January, 1830, provided the enhanced rate of subscription had been paid by them; and that the claims of all widows to whom the provisions of the revised rules did not extend should be considered as under the regulations of April, 1825.

Miss *Flower* attained twenty-one on the 15th of October, 1842, and on the 13th of March, 1843, Mrs. *Flower* made a fresh application to the trustees. She stated that by her daughter's coming of age her own income had been reduced from £500 to £422 a year, and she asked that it might be made up to the full amount of £500, according to the rules of 1825. Her claim was not admitted. The secretary of the Fund wrote that a similar case in 1830 had been discussed, and it was then determined that in cases of bequest by a member of the Fund the property left should be considered the property of the widow and children collectively. She made no farther application. She died on the 23rd of December, 1863, and her daughter took out letters of administration to her.

On the 30th of July, 1867, the bill in Chancery in this suit was filed. It was amended on the 13th of April, 1870, and as amended, prayed that it might be declared that Mrs. *Flower* had been entitled from the time of her husband's death to an annuity of £300; that an account might be taken from that time to the time of her death, and that what was thereon found due might be directed to be paid (with compound interest) to Mrs. *Edwards;* That upon the death of Mr. *Flower*, his daughter became entitled to an annuity of £100 till she should attain nineteen, and to a sum of £500 on her completing her eighteenth year; and for accounts and general relief.

The trustees put in an answer, in which, among many other things, it was insisted that there had not been a compliance with the later resolutions of Mr. *Farish;* and that this claim was barred by the *Statute of Limitations.*

The cause was heard by Vice-Chancellor *Bacon*, who on the 3rd of March, 1874, made a decree declaring the widow entitled to the annuity during her life, subject to the deduction of £1 per cent. per annum, according to the regulations agreed on in 1826, and also declaring the daughter entitled to the annuity claimed. On appeal to the Lords Justices, their Lordships ordered the decree to be reversed, and instead thereof they directed that there ought to be paid to Mrs. *Edwards*, as administratrix of her mother, the sum of £186 11*s*. 8*d*., in respect of an annuity of £77 17*s*. 10*d*. (the balance required to make up her pension to £500 a year) between the 13th of July, 1861 and the 23rd of December, 1863 (the day of the death of Mrs. *Flower*), with interest thereon at £5 per cent. from the 30th of July, 1867 (the date of the filing of the bill) to the day of payment; and the costs of the trustees were ordered to be paid out of the Fund (1). This was an appeal against that order.

Mr. *A. E. Miller*, Q.C., and Mr. *Beaumont*, for the Appellants:—

There was not, in fact, any negligence or improper delay here. The resolutions which were to confer the additional benefits were suspended almost as soon as they were passed. Proper information as to the time of their actually coming into operation was not, as it ought to have been, duly communicated to Mr. or to Mrs. *Flower*. When she knew what was required, she offered the necessary subscription.

There is no justification for setting up the *Statute of Limitations*. This is a trust. The managers of the Fund are in the deeds and resolutions always described as trustees. They are trustees not merely for the association as against the rest of the world, but they are trustees of the Fund itself for the protection of the beneficiaries. The money due was improperly withheld by the trustees, and interest is now due upon it: *Boldero* v. *The East India Company* (2).

Mr. *Cotton*, Q.C., Mr. *Kekewich*, and Mr. *Hornell*, for the managers of the fund:—

They are not properly trustees: *Knox* v. *Gye* (3); and the delay here is a good answer to the present claim: *Brown* v. *McClintock* (4). There was nothing here, as in that case, to excuse the delay. The conditions on which the additional benefits for the widow were to be obtained were never complied with by Mr. *Flower* during his life, and his widow had no title to supply what he had thus left undone.

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(1) Law Rep. 9 Ch. Ap. 495.

(2) 11 H. L. C. 405. 11 Jur NS 493

(3) Law Rep. 5 H. L. 656.

(4) Ibid. 6 H. L. 456.

Mr. *Macnaghten*, for the Secretary of State for *India*.

H. L. (E.)
1876
EDWARDS
v.
WARDEN.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, this case has been argued at very great length before your Lordships; and, there being a considerable sum involved in some of the propositions contended for by the Appellants, no doubt it is a case of much pecuniary importance to them, and everything that could be done in support of the larger proposition for which they contended has been done by their learned counsel who have appeared at your Lordships' Bar.

But, my Lords, with regard to the larger part of the claim of the Appellants, I mean that which depends upon those resolutions which have been termed Mr. *Farish's* resolutions, the case appears to me really to lie in a very small compass, and to be perfectly free from any ambiguity or doubt. The only reference which I need make to Mr. *Farish's* resolutions will be to these :—The 7th resolution provided "for this advantage" (that is to say, the advantage of payments to widows and children without regard to their possession of property) "it would only be just that subscriptions should be paid by members accepting the annuity"—that is to say, by members retiring from the service and coming home to *England* upon an annuity—"as well as by those in the service, in order to their securing the privilege in question to their families. Of course, those only to whom it was an object to secure this reversionary interest would pay the premium; those who did not desire it would not subscribe after they took the annuity." The resolution contemplates that the offer which was to be made was one which might be accepted, or might be declined. It might suit persons retiring from the service, ceasing to be members of the Fund and receiving their annuity, to make no farther payment and take no farther interest in the Fund—to live upon their annuity, and to trust for their family being provided for sufficiently from some other source. Or, on the other hand, they might prefer to continue to make out of their annuity, or in respect of it, these payments, in order to secure reversionary benefits for their families. And then your Lordships will observe these resolutions: "That the pensions now granted only to widows and children who do not possess property to the amount specified in the regulations, be henceforth granted in all cases to the widows and children of members of the new annuity and charitable funds." Secondly, that to entitle a member to the benefit of the foregoing resolution in behalf of his family after he shall have accepted the annuity" (that is to say, the annuity on retiring from the service), "he shall subscribe to the charitable fund one per cent. per annum on his annuity, or one per cent. at the time of acceptance, upon the total value of his annuity as laid down in the tables furnished us by the Court of Directors."

Those, my Lords, being the terms of Mr. *Farish's* resolutions, and that being the proposal which those resolutions made, I may, without going in detail through the minute history of what took place, remind you that the resolutions, in the first place, were suspended with regard to any operation until the assent of the directors of the *East India Company* should be procured. That assent was obtained, and was communicated to the service, the members of this Fund, on the 5th of January, 1830. Mr. *Flower*, the husband of Mrs. *Flower*, who was the mother of the lady now the Appellant at your Lordships' Bar, left *India* a few days before this communication. He left *India* for *England*, on furlough, on the 27th of December previously, in the year 1829. Leaving on furlough, of course he still continued at that time a member of the service and a member of this Fund. But, on the 1st of May, 1830, he retired from the service. He ceased to be a member of this Fund, taking his annuity which he was entitled to under the regulations of the Fund for the remainder of his life. Therefore, my Lords, the position of Mr. *Flower* was this: on the notification of the 5th of January, 1830, it may be assumed that Mr. *Farish's* resolutions would come into operation, and if so, while they were in operation, on the 1st of May, 1830, Mr. *Flower*, as I have said, retired from the service.

My Lords, from these resolutions, having regard to the terms of them which I have read to your Lordships, it is of course evident that something was to be done by Mr. *Flower* before it could be said of him that he was anxious or desirous to accede to the terms offered by Mr. *Farish's* resolutions. Up to the time of his retirement from the service nothing whatever was done, no intimation whatever was given by him as to whether he would desire to accept or not to accept the advantages of Mr. *Farish's* later resolutions. On the 8th of June, 1830, about six weeks after Mr. *Flower* retired from the service, the resolutions of Mr. *Farish* were again suspended; and on the 11th of February, 1834, the resolutions still continuing suspended, Mr. *Flower* died.

Let us observe exactly what was the position of Mr. *Flower* at the time of his death. Up to the retirement of Mr. *Flower* from the service, on the 1st of May, 1830, I have stated to your Lordships that he had done nothing to indicate his acceptance of the terms held out by Mr. *Farish's* later resolutions. From the 1st of May, 1840, until his death, it appears, and it must be assumed, that he did nothing whatever in the way of expressing any desire to accept those proposals. During that time Mr. *Flower* must be looked at under one of two different aspects: either he was a person assenting to the suspension of Mr. *Farish's* resolutions, or he was not. It is quite true that he was not a member of the Fund, and therefore was not an active party in coming to a determination as to whether the resolutions should be suspended or not; but he must be taken to have assented or not to have assented to that suspension. If he assented to the suspension, he was then just as if he had continued a member of the Fund, and *quoad* him the resolutions had no operation. If, on the other hand, he did not assent to the suspension of those resolutions—if he held the view that, those resolutions having been in operation when he retired from the service, no suspension of them could afterwards operate to his disadvantage, but that he was entitled to proceed as if *quoad* him they never had been suspended at all—still his duty, his obligation, was to manifest in some way that he was a person who desired to accept Mr. *Farish's* resolutions. It was for him to come and tender the payments which had to be made under Mr. *Farish's* resolutions; and, if he was told thereupon that the resolutions were suspended, it was for him to say that he did not assent to their suspension, but would insist upon treating those resolutions as if, for his benefit, they continued in operation. But, as I have said, Mr. *Flower* did nothing; and from the first to the last, from he date of his retirement to the date of his death, it is absolutely impossible for any person, looking at these papers, to say whether Mr. *Flower* desired or did not desire to come under the offer made to him in Mr. *Farish's* resolutions. He died without, as I have said, having in any way accepted the benefits, or taken upon himself the burden, of the terms contained in those resolutions.

My Lords, that is the whole of the case in regard to Mr. *Farish's* resolutions. How or by what ingenuity of argument it could be contended under these circumstances that immediately after Mr. *Flower's* death, and, still more, twenty years after his death, any person representing him could come forward, and then seek to make an election which Mr. *Flower* never made, to make an election, namely, after the event has happened, and after it is known what is the exact amount of benefit which will be derived, I myself am entirely at a loss to understand. And I entirely agree, and submit to your Lordships that you should agree, with the decision of the Lords Justices in this respect.

My Lords, I do not dwell upon the application which was made by Mrs. *Flower* after her husband's death to have the benefit of Mr. *Farish's* resolutions. Even supposing that she made the claim in the clearest way, it was a claim which, in my opinion, she was not entitled to make, and no language in which she made it, and no language in which her claim was spoken of in answer to her application, could, as it seems to me, in any way give her the right, or give those who now represent her the right, to insist upon the benefit of Mr. *Farish's* resolutions.

Therefore, my Lords, so far as the decree of the Lords Justices has proceeded upon the footing of refusing this larger claim made by the Appellants, I think your Lordships will be disposed to say that that decree is entirely right.

But then, my Lords, arises another question. Mr. *Flower* left an only daughter, who is, as I have said, the lady Appellant at your Lordships' Bar. This daughter came of age on the 15th of October, 1842. A provision had been made for the daughter by Mr. *Flower's* will to the extent of £6000, and during the minority of the daughter the income of that sum was to be paid to Mrs. *Flower*, she maintaining and educating the daughter. When the daughter came of age in 1842, or after she came of age, namely, in 1843, Mrs. *Flower* wrote to the trustees of the Fund a letter, and stated to them that by reason of the circumstances that her daughter had come of age, and that therefore the income from the

£6000 would no longer be paid to the mother, her income had become reduced below £500, and in fact now fell short of £500 by the sum of £77. 17*s.* 10*d.*, and she asked to be admitted an annuitant upon the Fund as a widow whose income was under £500, and who was entitled to the sum necessary to make her income up to £500, that is to say, that she should have assigned to her an annual sum of £77. 17*s.* 10*d.*, to make up her income to that amount.

My Lords, I need not go in detail through the correspondence. Your Lordships will remember that her letter was met in this way. The trustees of the Fund said that a provision having been made for the daughter by the will, the property provided for the daughter, and the property provided for the mother, must be looked at together under under the regulations of the Fund—that that had been so decided in a former case, and that the income, therefore, of the widow could not be held to fall below £500. My Lords, that has been held by the Lords Justices, and it appears to me rightly held (and there is no cross appeal by the trustees of the Fund against that holding) to have been an error in point of law, as regards the construction of the rules and regulations of the Fund. The Lords Justices have held that where the question arises upon a provision made for the widow alone, when the daughter does not seek to come upon the Fund, the property provided for the daughter is not to be added to that provided for the widow, and that therefore the income of the widow, so far as it fell below £500, ought to have been eked out by an annuity to be allowed to her. I think your Lordships will be of opinion that the widow was entitled to an allowance in that respect from the Fund.

But then arises the question, that having occurred in 1843, and the widow, Mrs. *Flower*, having died in 1863, and we being now in the year 1876, for how long is this supplementary annuity to be paid to the present Appellants? That raises the question of the applicability of the *Statute of Limitations*, and the farther question of whether the right of the widow is in the nature of a trust for her benefit. My Lords, the Lords Justices here have held that, from the constitution of this Fund, there is nothing in the nature of a trust for a widow in the condition of Mrs. *Flower*. As I understand it, the Lords Justices have held, that by the constitution of this fund, there was a contract among the members of the Fund, that is to say, the members of the service, and that under that contract provisions enured to the benefit of the widows and the children, but that the widows and the children themselves were not *cestuis que trustent;* I so understand the decision.

My Lords, that raises the question of the proper construction of the terms of the regulations of the trust fund. The persons who hold the trust are undoubtedly trustees; they are so styled, and the money is clearly not their own—they are to invest it and to use it for the purpose of the regulations. The holders of the Fund, not being themselves entitled to the Fund, for whom are they trustees? My Lords, I turn to the regulations of the Fund, and without going through them at length, I find that, under the fifth article, the 4th section provides, "the provident branch of the Fund shall be applicable to the payment of all demands arising from the first three objects of the institution." The first three objects are, first, a provision for members obliged by ill health to leave *India;* secondly, to provide for such members as by unavoidable accident or misfortune are compelled to renounce the service;" and, thirdly, "to provide for the widows and children of members dying without having been able to make an adequate provision for their families." Those are the first three articles, and they are all *in pari materiâ*, the provision for the members being spoken of just in the same way as the provision for the widows. The provident branch, therefore, is to be applicable to the payment of all demands arising from these, the "first three objects of the institution, as likewise for the payment of all extra charges of management," &c. And we find, "The widow of every member of New Annuity and Provident Fund dying, shall be entitled to receive from the Fund an allowance or pension not exceeding £300" in the one case, and according to the property which she possessed in another.

My Lords, I took the liberty of saying during the argument that I think there is no doubt or question that this is not a document which in any way affects to be couched in legal phraseology. It is a document in popular language, laying down the rules for the management of this Fund in the hands of trustees in words which would be understood by persons unversed in law and accustomed to transact ordinary business. But it seems to me that the words I have read, when presented to the mind of a lawyer, have no meaning unless they mean this, that the trustees shall hold this trust fund for the purpose of satisfying not only to members of the Fund, but to the widows of members, every claim which, according to the proper construction of the rules, those persons are entitled to make against the Fund. If that be so, it appears to me, my Lords, to be nothing but a declaration that the Fund shall be held upon these trusts, and that the persons to whose benefit these trusts enure must be the *cestuis que trustent* of the Fund. It is quite true that no widow can say she is a *cestui que trust* of any specific sum of money, of any specific rupee of the whole of this Fund, unless or until it is set apart to answer her annuity; but, notwithstanding that, she appears to me clearly to be in the position of a *cestui que trust*, and entitled to say, according to the proper construction of these rules, I ought to have an annuity provided for me, and I stand as a *cestui que trust* entitled to insist upon the provision of that annuity.

My Lords, if that be so, in 1843 when Mrs. *Flower* informed the trustees of the Fund that her income had fallen under £500 a-year, she appears to me to have been entitled to have her £500 a-year made up from the Fund, and to have been certainly from that time a *cestui que trust* of the Fund to that extent. With regard to the precise sum that she is entitled to have made good, the claim she made was, as I have said, a claim to an additional annuity of £77. 17*s.* 10*d.* The Lords Justices, confining her claim by the *Statute of Limitations*, have held that to be the sum. My Lords, there may perhaps be some doubt, after what your Lordships have heard, whether that is not slightly in excess of the claim she might have established, but no cross appeal on this point has been presented by the trustees, and it has very properly not been presented, because the difference between this sum and the sum to which upon a more rigid examination of her claim she might have been held entitled, is obviously extremely minute. Therefore, I think your Lordships will take it that she is entitled to this annuity of £77 17*s.* 10*d.*, and if your Lordships concur with me in saying that the *Statute of Limitations* cannot apply to a claim of this kind she is entitled to it from the time her daughter came of age, namely on the 15th of October, 1842. Up to that time she herself has decided that she had no claim against the Fund by reason of the property she was enjoying.

But then, my Lords, it is said, if your Lordships hold that, you should also give to those who represent Mrs. *Flower* interest upon each payment of this annuity as it became due. My Lords, I cannot take that view. The Lords Justices, awarding to the Appellants the annuity for the time not excluded by their view of the *Statute of Limitations*, have given interest upon the sum from the filing of the bill. I cannot myself understand upon what principle that has proceeded; but, looking at the question from the beginning, from the year 1843, it appears to me that although this lady is a *cestui que trust* of the Fund, yet as no sum had in point of fact been set apart to answer her annuity, she cannot say that any part of the Fund has been hers during all that time, or that it has been bearing interest or making profit for her benefit. She, in this respect, is quite as much answerable for any delay that has taken place as the trustees of the Fund are. They no doubt were under the impression, and the *bonâ fide* impression, that when she made her claim for this small annuity, she was not entitled to succeed, and they told her so. She might have brought that matter at that time to issue, or she might have applied yearly for her annuity, and then they perhaps might have been in some default for not having yearly paid it to her. But as it is, she is not less chargeable for the delay that has taken place than the trustees are. In my opinion she is not excluded by the *Statute of Limitations*; but, on the other hand, she is clearly not by contract or by trust, and certainly not by her conduct, entitled to interest upon the arrears of the annuity from year to year. In my opinion she is entitled to the annuity from the date I have mentioned up to the time of her death, the 23rd of December, 1863, and to nothing more.

My Lords, what I have said, if it is concurred in by your Lordships, will lead to an alteration in the decree of the Lords Justices, and to awarding to the Appellants a larger sum than they have received, or could receive under that decree.

Something was said at your Lordships' Bar with regard to the costs of the suit, and the manner in which they were dealt with by the Vice-Chancellor. The Vice-Chancellor acceded to the entire claim of the Appellants—the larger claim under Mr. *Farish's* resolutions—and I think he gave them the costs of the litigation, either out of the Fund, or to be paid by the Defendants. My Lords, the Lords Justices dismissed so much of the bill as made a claim under Mr. *Farish's* resolutions; and it appears to me that now, in substituting, as your Lordships will do, what ought to have been the original decree to be made upon the claim of the Appellants, the proper course to be taken will be this: to retain that part of the decree of the Lords Justices which dismissed a portion of the bill, but to give the Plaintiffs in the original suit relief upon the footing I have mentioned, namely, payment of the annuity of £77. 17*s.* 10*d.* from the time of the claim being formally made up to the death of Mrs. *Flower;* and, in my opinion, the Appellants are entitled (relief having been refused to them by the Lords Justices) to their costs of the suit originally; but, on the other hand, the part of the bill which is dismissed ought, I should submit to your Lordships, to be dismissed with costs.

That will be the form of the decree, which, upon the whole, I should recommend your Lordships to make, varying, so far, therefore, the decision of the Lords Justices.

LORD CHELMSFORD:—

My Lords, the principal question to be determined is whether Mrs. *Flower* had before her death become entitled to the privilege of a widow upon the *Bombay* Civil Fund, according to the rules and regulations for the management of the Fund, agreed upon on the 1st of May, 1825, as modified by the resolution of the general meeting of the 8th of May, 1826:—[The noble Lord here stated the facts of the case.]

At the time of his death, what had he done to give his widow a right to any pension but that to which he had entitled her when he left the service?

I am utterly at a loss to understand the argument that Mrs. *Flower* might have entitled herself to the pension claimed for her by the Appellants, if she had not been ignorant of her rights. What, with the fullest knowledge, could she have done in 1838 to gain for herself the pension which her husband had refused or neglected to qualify her to receive?

The learned counsel for the Appellants referred to the proceedings of two meetings, of the 28th of November, 1837, and the 3rd of November, 1840, where it was agreed that widows who came on the Fund subsequently to the 1st of January, 1830, were to be entitled to annuities upon certain terms. But upon what widows was this benefit conferred? Expressly on those by whose husbands the enhanced subscription was paid. This enhanced subscription can only mean the 2 per cent. which at the meeting of the 1st of January, 1830, was to be levied from that date, which accounts for the privilege of entitling themselves to annuities being confined to widows who came on the Fund afterwards. So the above privilege, when extended to widows whose husbands were alive and in the service on the 1st of January, 1830, by the rules and regulations of 1840, is accompanied with a proviso that the enhanced rate of subscription had been paid by the husbands.

Mrs. *Flower*, therefore, could not have availed herself of the benefit conferred upon widows by these rules, even had she not been in ignorance (as is alleged she was) of their existence.

But allowing them to be right as to the regulations under which Mrs. *Flower* became entitled to her pension, were they correct in estimating its amount and in holding that the *Statute of Limitations* applied, and prevented the Appellants recovering more than the arrears for six years before the filing of their bill.

They were of opinion that the claim of Mrs. *Flower* ought to be allowed only from the time of her first application to the *Bombay* Civil Fund on the 13th of March, 1843, and to the extent stated by herself upon the reduction of her income to the amount of £422. 2*s*. 2*d*., and as to this part of the decree there can be no valid question. But upon the question as to the *Statute of Limitations* the Appellants contend that the managers of the Fund are trustees, and therefore that the statute does not apply. The Lords Justices held that there was no relation of trustee and *cestui que trust* between any person or persons and Mrs. *Flower* or her representative. They say: "The managers, it is true, are called trustees, but they are trustees (so far as they are trustees at all) for the association, not for persons having claims against the property of the association."

But, with great respect, I cannot concur in this view. The whole property of the Fund, by the rules and regulations of 1825, is vested in the committee of managers as trustees. Trustees for whom? Clearly for those who are the objects of the Fund. The *cestuis que trustent* are not, as the Lords Justices say, the association, but every person who has acquired a right to have a certain portion of the Fund appropriated to him or her by the trustees.

That there has been unaccountable delay in asserting the claim cannot be denied; and a question arises from what time this delay must be taken to have prejudiced the right to which Mrs. *Flower* became entitled on the death of her husband. From his death in 1834 she took no step in assertion of her claim until the 13th of March, 1843. If it be said (as it was in argument) that the trustees were bound to take notice of her right, I cannot assent to this. It is clear to my mind that the trustees are not bound to move until they are put in motion by the person claiming the benefit of the provident fund.

By sect. 4 of Art. 13 of the rules and regulations of 1825, "in all cases of application to the Fund for assistance to the family of a deceased subscriber an authenticated will of the deceased, or, if he shall have died intestate, a full and authentic statement of any property left by him and of the legal claimants thereto, must be submitted for the information of the managers and trustees." How was it possible for the managers to assign the proper amount of annuity without obtaining from Mrs. *Flower* all the requisite particulars? As she had not placed the managers in a position to determine what her annuity ought to be, and could not possibly have one assigned to her till she did so, her delay from her husband's death until the 13th of March, 1843, must operate against her claim, as during that interval the managers could not be trustees for her of an annuity which had never been and could not be assigned.

I think the Appellants are entitled to Mrs. *Flower's* annuity from the 15th of October, 1842, the time of the daughter's coming of age, down to her death, and that the amount of that annuity ought to be £77 17*s*. 10*d*.

I agree to the disposal of the case in the manner proposed by my noble and learned friend.

LORD HATHERLEY :—

My Lords, the case has been so fully stated to your Lordships by my two noble and learned friends that I shall content myself with simply saying on what grounds I arrive at the same conclusion with them.

It appears to me perfectly plain that the deceased Mr. *Flower* neither did take the benefit, nor attempted to take the benefit, in any shape or way, of those resolutions which are called Mr. *Farish's* resolutions. He left *India* at a time when, so soon as they should be confirmed, which was not until some little time afterwards, by the Court of Directors, he would have been at liberty to take the benefit of those resolutions. They were, no doubt, shortly afterwards suspended, but even then we do not find that he takes a single step towards expressing a wish or desire of making the payment, still less does he take a single step towards actually making the payment, which would be necessary in order to secure for his family the benefit of those resolutions. Had he desired to do so, it would have been necessary either to pay a sum down or to have an amount deducted from his annuity. Nothing of the kind was done.

It was argued before us that in some way or other we were to assume (for I do not know in what other way we could get at it) that, communications having been made to other contributors to the fund, and notably to a person named *Goodwin*, some communication of a similar nature would probably have been made to Mr. *Flower*, and that his withholding an immediate contribution to the fund might be justified on the ground that he was told of the suspension for a time of the resolutions, and that he had been informed, as some other people were informed, that when a change took place and the resolutions of Mr. *Farish* were again revived, a farther communication should be made to him.

But, my Lord, there is nothing whatever of the kind appearing in the case. In truth, what we do find from the evidence we have upon the subject is this. On the part of Mrs. *Goodwin* and on the part of Mrs. *Flower* also, there appears in the year 1838 to

H. L. (E.)
1876
EDWARDS
v.
WARDEN.

have been a desire of setting forth their respective cases in the best manner in which they could place them before the trustees of the Fund in order to be communicated to the service. And in so doing, as was noted by one of my noble and learned friends during the argument, they evidently were acting in concert, I do not say in improper concert, but they were acting in concert together,—and addressing identical notes, so far as the circumstances would permit it, to the trustees of the Fund, except that Mrs. *Flower* was unable to refer to any letter of her husband declaring his readiness to make payments to the Fund in accordance with the resolution. The simple position of things with regard to the larger claim is this: those who are now claiming upon the Fund are claiming under a gentleman who had not performed the necessary condition of making a contribution or a payment. All these benefits to be derived from the Fund by the widows and children of members are very much in the nature of insurances, where it is a condition precedent that a premium of insurance must be paid before any possible claim can be founded upon a policy.

That being so, an attempt was made to fix upon the resolutions which were subsequently passed by the Civil Service Fund, in order to entitle the present claimant, as representing Mrs. *Flower*, to the benefit of the resolutions previously passed on the motion of Mr. *Farish,* ultimately adopted. Now looking to what took place, especially at a meeting in 1837, upon which great reliance has been placed, you find that there was propounded to the meeting a resolution to extend the benefits of the Fund "to the families of deceased annuitants on the payment of two-thirds and to the annuitants whose annuities commence before January, 1830, on the minimum payment of one-half the full value of their claims." But that resolution was negatived; and in lieu of it this resolution was passed: "That the operation of the extended provisions of the Fund be limited to the families of those members who were in the service at the time when Mr. *Farish's* propositions were brought into full operation, and when the additional subscriptions to give effect to them were levied." That clearly indicated that it was the intention of the meeting that no such extended benefit should be given where the payments had not been made. The expression is varied a little in the resolutions of 1840, where the expression is where "the enhanced payment had been made." But I apprehend that the two are identical. In either case it was meant that those persons were to have the benefit of the resolutions who claimed under parties who were in existence at the time that the levies were made; so that in truth the contributions had been made, at that time at all events, although the death of the parties might subsequently have occurred. But in the case of Mr. *Flower* no such contribution has ever been levied upon the income, and he has in no way contributed to that Fund out of which alone he could have claimed provision for his widow and family.

My Lords, as regards the other part of the case, it appears to me that the view which my noble and learned friends have taken is the right one, namely, that the payment is to be dated from the date of that letter, which was written by Mrs. *Flower* in 1843, that is to say, from the date of the daughter's coming of age, which diminished the income of the widow, but founded upon the letter of that date as stating the amount of income to which she was then entitled, and to the making up of which to the full sum of the annuities granted under the provisions of the Fund, she alone made any claim. I think we must take it that she must have been aware what information she was bound to furnish for the purpose of making any claim whatever to an annuity, it being a part of the provision in the deed that a person making a claim shall at all times bring the documents and papers to substantiate that claim. We must take her at this date to have been for the first time making a claim directly, and I think the Lords Justices did quite right in adopting that as the proper criterion of her right.

As regards the other question, the only question which appeared to me from a very early part of the argument to admit of serious discussion, namely, the question whether this is trust or the subject of an action, that is to say, ought to be regarded as a legal debt, I cannot have any doubt, looking at all the limitations in this instrument, that a trust was intended; for I treat these resolutions as if they were to be found in a deed containing exactly the same clauses; that is the correct way of putting it. I think you cannot look at them without seeing that trust was intended. I quite agree that the use of the word "trustee" on the one side or on the other will not include every claim as between the two parties. The persons who hold the fund upon which that claim is made, may be trustees for the persons whose fund it is, subject to the claims, and on the other hand, trustees for the persons making the claims upon the fund. Therefore there may be trustees on both sides, without after all the whole thing being anything but a debt between the one side and the other. But looking carefully through the whole of this deed (and I think the answer of Mr. *Cotton* to the question whether he thought himself entitled, even technically, to insist that the executors should be parties, involved the whole point in question), I think, regard being had to the shape and frame of that deed, it never was intended—nobody could even think upon the fair construction of the deed that it was intended—by the different contributors to the Fund, that upon their decease their executors should be bound to put in suit the claims of the widow and the children, but they did intend a distinct and direct benefit to the widows and children such as could be insisted upon by them and put in force by them in their own right, and independently of any claim through the executor as their trustee. I found myself in that respect entirely upon the wording of the deed—I do not think it necessary to go through the different clauses shewing how that conclusion is to be arrived at—I think it is plain and distinct upon the different clauses which have already more than once been referred to in the argument, that that was the intent and purport of the scheme, and that any notion of resisting the claim on the ground of the absence of the executor is one that must entirely fail of having any effect given to it by any Court before whom the controversy could arise. Therefore the whole resolves itself into a complete trust on behalf of those who were the objects of the provisions made by this Fund; and then, of course, the result follows which has been arrived at in the order suggested by my noble and learned friend on the woolsack, namely, that the payments must date from a period anterior to that fixed by the decree of the Lords Justices, namely, the coming of age of the daughter, which diminished the income of the widow.

As to interest, it is a case in which it is clear, upon the face of all the authorities, that it would be impossible to grant interest upon a claim accruing as this has done. And if there could have been any hesitation upon any of the authorities, the circumstances in this case entirely preclude the Court, as it appears to me, from doing more than giving the actual payments which became due, not allowing any interest in respect of them, but simply taking the payments *de anno in annum*, from the period when the widow's claim arose.

LORD O'HAGAN:—

My Lords, I am of the same opinion on both the points; and after the exhaustive statements which have been made already, I feel it needful only to say a very few words as to the grounds on which I think our judgment ought to be that which has been proposed by my noble and learned friend on the woolsack.

As to the first point, I confess that, but for the decided difference of opinion between the learned Judges in the Court below, I should have had no doubt upon the construction and effect of the later resolutions of Mr. *Farish*. Under the second of those resolutions, a member of the *Bombay* Civil Fund was entitled to procure for his widow and family the benefits provided by the first, but he was to be permitted to procure those benefits only upon two conditions. The first condition was, that he should be an annuitant; and the second that, after accepting the annuity, he should subscribe to the Charitable Fund. Those two conditions were both, I think, essential and imperative; the words are, "he *shall* subscribe," casting upon him absolutely the duty of subscribing. The initiative is with him. He must act in the matter; he is not at liberty, as was argued at the Bar, to wait until the trustees or others may come to him and ask for his subscription. He must exercise an active option for himself and in his lifetime, in order to secure the advantages which the first resolution offers to his wife and children.

In this particular case, Mr. *Flower* fulfilled the first condition; for he was an annuitant, but he utterly failed to fulfil the second. He failed to fulfil it because, from the period at which it became competent to him to do so, he did not subscribe, nor pay, nor did he tender his subscription, nor in any way exercise, by word or act, the option which at any time before his death he was free to make. And it is not to be said that, having so failed; having lain by in absolute passiveness till the end of his life, his family shall be at liberty to assume his position and exercise his power, when circumstances may have entirely altered, when the reasons which may have induced him deliberately to withhold his contribution may have ceased to exist; and when the surviving members of the Fund may be unjustly and injuriously affected by a claim of his family, which could legitimately be justified only by his own subscription, and for which neither the terms of the resolutions, nor the reason of the thing, furnish any sufficient warrant. The conditions being unfulfilled, the right dependent on them cannot be admitted.

My Lords, there is another observation proper to be made on this part of the case. It was said that even though the words of the resolutions might be clear, and the conditions essential, inasmuch as there was a suspension of them from time to time, Mr. *Flower* was exonerated from the duty of either subscribing or tendering his subscription, and so exercising his option in the interest of his family. The answer to that appears to me to be twofold; first, that although some other people got notice of the suspension, there is no evidence that any was given to Mr. *Flower*, or that the fact of the suspension really affected his conduct in the least degree. It does not appear that he knew of any such suspension, or concerned himself to inquire about it. And it is not reasonable that his widow should be allowed to rely upon no notice having been given, in order to account for or condone the absence of a needful proceeding, which had nothing to do with notice. But in the second place, however this may be, and whatever might have been the effect of a notice served upon him in any other way, the result of its service as to the question before the House would have been the same. Mr. *Flower* remained passive—he did not come forward and object to the suspension—he did not pretend to be dissatisfied with it during his life. He did not declare his readiness to fulfil the conditions. He lay by until his death; and therefore I agree with the Lords Justices, he must be taken to have given his tacit assent to the course which had been adopted, and to have sanctioned the rescission of the agreement which it is now proposed to rehabilitate, after his decease, for the benefit of his family.

My Lords, upon the first point, therefore, I cannot say that I have any doubt. Upon the second, I think, with the Vice-Chancellor, that there was a "clear and direct trust;" and this being so, the consequences follow which have been so fully indicated by my noble and learned friends that I need not say a word upon them. Authority has disposed of the question of interest; and upon it, as upon all others in this case, the proposal of the Lord Chancellor appears to me entitled to the approval of your Lordships.

LORD SELBORNE:—

My Lords, whatever might be the equities of any person who might have paid any money on the faith and footing of Mr. *Farish's* resolutions, after the Court of Directors had assented to them, and before they were suspended, I am of opinion that they could not have conferred any right upon the widow of any member living at the time of the suspension, who had made no such payment. Even if the terms of these resolutions had not made any such payment a condition precedent of the benefits purporting to to be conferred by them, I should have been of opinion that any member, living at the time of the suspension, who had done nothing on the footing of these resolutions, must have been as much bound by the vote for their suspension as the rest of the members had previously been by the resolutions themselves, even though he might during the interval have retired from the Company's service, and might have become an annuitant upon, instead of an annual contributor to, the Fund. To this extent I am compelled to differ from that part of the Lords Justices' judgment, which is expressed in these words:—"It is contended, and we think rightly, that Mr. *Flower* having ceased to be a member, and having become an annuitant after the suspension had been removed, and before it was reintroduced, he became for himself, his wife, and daughter, absolutely entitled to the benefit of those resolutions, and that the members could not by any subsequent act deprive him of his vested right."

This, however, is not, in the result, material; because I agree with the Lord Justices that the benefits offered by these resolutions were not absolute, so as, by force of the resolutions only, to confer any vested right upon any person: but that any benefit to be derived from them was contingent upon acts to be done by each particular member who might desire to obtain that benefit, which acts were never done by Mr. *Flower*, though he lived for four years afterwards. Even if he believed himself to be entitled to the benefit of the resolutions, and was led to abstain from claiming that benefit by reason of their subsequent suspension, and of the character of the letters written to other persons by the managers of the Fund after the event, the case would be in no way altered in the Appellants' favour. Acquiescence, under such circumstances, in the suspension, could never be a reason for exonerating a person who might afterwards contend that he was not bound by that suspension from the condition on which alone (if there had been no suspension at all) he could have become entitled to any benefit.

With respect to what was done after Mr. *Flower's* death, it appears to me quite clear that nothing was ever done to give his widow any other or greater right than her original right under the rules of 1825. In substance, Mr. *Farish's* resolutions never came into operation; a different arrangement, on different terms, was substituted for them by the resolutions of 1837 and the rules of 1840, and to the benefit of that new arrangement Mrs. *Flower* was never entitled as of right, and her claim was never admitted by any vote of the members of the Fund.

Upon the rest of the case I think it quite unnecessary to add anything to what has been said by your Lordships, except that the claim of interest on the arrears of the annuity in such a case as this is clearly excluded by the authorities, of which it is sufficient to mention *Taylor* v. *Taylor* (1), and *Torre* v. *Browne* (2), the latter decided by this House.

Declare that the Appellants are entitled to be paid out of the Fund an annuity of £77. 17*s*. 10*d*. from the 15th of October, 1842 (when the daughter attained twenty-one) until the 23rd of December, 1863 (the date of Mrs. *Flower's* death). Declare that so much of the bill as is dismissed by the decree of the Lords Justices ought to be dismissed with costs up to the hearing before the Vice-Chancellor. Declare that, except as aforesaid, the Appellants ought to be paid by the trustees of the Fund the costs of the suit up to the hearing before the Vice-Chancellor. Ordered, that the Appellants do pay the costs of the Secretary of State in this appeal; and ordered that the Respondents, the trustees of the Fund, repay to the Appellants, out of the Fund, the costs so paid. The decree of the Lords Justices varied so far as aforesaid, and the case remitted with these declarations.

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(1) 8 Hare, 120.

(2) 5 H. L. C. 555.

Lords' Journals, 7th April, 1876.

Solicitor for the Appellant: *W. A. Day.*

Solicitors for the Respondents: *Freshfields & Williams; Lawford & Waterhouse.*

[PRIVY COUNCIL.]

BANK OF BRITISH NORTH AMERICA . DEFENDANTS;

AND

SAMUEL STRONG . . . . PLAINTIFF.

J. C.*
1876
Feb. 10.

ON APPEAL FROM THE SUPREME COURT OF HALIFAX, NOVA SCOTIA.

Demand under Canadian Insolvent Act of 1869—*Writ of Capias—Libel and Malicious Prosecution—Misdirection.*

Declaration in the Supreme Court of *Halifax, Nova Scotia*, charging the Defendants in the first three counts with falsely and maliciously writing and publishing concerning the Plaintiff the words contained in a certain notice served upon him under sect. 14 of the Statutes of *Canada*, 32 & 33 Vict. c. 16, requiring him, being indebted to them or others on certain promissory notes long overdue, to make an assignment of his estate and effects for the benefit of his creditors, and alleging in the fifth count that the Defendants maliciously and without reasonable or probable cause obtained a writ of *capias* against the Plaintiff, in an action on certain promissory notes of which the Plaintiff was the maker and the Defendants were the indorsees for value, by falsely and maliciously representing by a false affidavit that the Plaintiff was about to leave the province, and alleging the arrest of the Plaintiff thereunder and his subsequent discharge by an order of Court on its appearing that he was not about to leave the said province.

4 CPC
178
6 QBD

Plea to the first three counts, a denial of publication to any one but the Plaintiff, and that the notice contained a true statement of facts; to the fifth count, that having been informed and believing that the Plaintiff was about to leave the province the Defendants caused proceedings to be taken to recover their debt, which was of long standing.

The Judge directed the jury that if the Defendants did not at the time of the arrest believe that their debt would be otherwise lost, and acted with a view to protect the interests of the indorsers of the notes rather than their own, that would be evidence of want of reasonable and probable cause for arresting, and entitle the Plaintiff to damages; and the Court subsequently, in discharging a rule nisi for a new trial, held that the general verdict, including damages in respect of the first three counts, was justified on the ground that the pleas of the Defendants to those counts did not deny the material allegations of publication, falsity, and malice:—

Held, that there was misdirection, which justified a new trial. There was

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.
1876

BANK OF BRITISH NORTH AMERICA *v.* STRONG.

reasonable and probable cause for the arrest if the Defendants believed that the Plaintiff was about to leave the province, and that their remedy against him would be lost if he were not arrested; notwithstanding they might have believed that they could recover the debt from the indorsers, and were endeaing to protect the interests of the indorsers.

The said notice being a legal proceeding was *primâ facie* privileged, and no action would lie for the delivery of it to a third person for service upon the Plaintiff unless upon proof of express malice. The allegation of falsity was implicitly denied, and there was therefore no necessity to expressly deny malice.

THIS was an appeal brought to set aside a verdict obtained by the Respondent in an action brought by him against the Appellants under the circumstances stated in the judgment of their Lordships.

The facts and pleadings in this case are sufficiently set forth in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *Bompas*, for the Appellants:—

The law of *Nova Scotia*, with respect to pleadings in an action, is contained in c. 94 of the Consolidated Statutes of *Nova Scotia*, which introduces a system analogous to that in force in *England* previous to the passing of the *Judicature Act;* but by sect. 152 pleading the general issue is not allowed; and by sect. 142, if the Plaintiff does not reply before trial, he is to be taken to have denied the facts alleged in the pleas. In this case the Appellants proved the pleas which they pleaded. A demand in insolvency served in accordance with the provisions of the Statutes of *Canada*, 32 & 33 Vict. c. 16, s. 14, which has assimilated the insolvency laws throughout the whole dominion, does not constitute a libel, and is only actionable if issued maliciously and without reasonable and probable cause; and the Judge ought therefore to have withdrawn the first three counts in the declaration from the jury. The fourth count there was no pretence for, and with respect to the fifth count, even assuming that the manager of the Appellants maliciously applied for the writ of *capias* without reasonable or probable cause, and in the interest of the indorsers of the promissory notes, and not of the Appellants, the latter would not be responsible. They are not liable under such circumstances for the act of an agent, for the agent would only have a limited authority.

Moreover, an action for malicious prosecution will not lie against a corporation; for a corporation cannot entertain malicious feelings or motives, which are an essential ingredient in the action. [SIR MONTAGUE E. SMITH:—However malicious a prosecutor may be, if he has reasonable and probable cause he cannot be touched.] At all events, if the agent of the bank, acting, as alleged, in the interests of the indorsers, had improperly arrested, the malice would have been in favour of the indorsers, and not of the bank. A creditor is entitled to issue a writ of *capias* against the principal debtor if he thinks that otherwise he shall be unable to obtain payment from the principal debtor, although there is a solvent surety; and the request of the surety that he should do so is not an improper motive for issuing such a writ. [SIR MONTAGUE E. SMITH:—Is this proceeding by arrest regulated by any code of procedure?] See Revised Statutes of *Nova Scotia,* Fourth Series, c. 94, s. 31. If the affidavit by which the writ was obtained was true and *bonâ fide,* the Defendants are not liable even if the Judge was wrong in issuing the writ. The Judge at the trial did not leave to the jury the question whether there was malice, either in respect of the issuing the demand in insolvency or obtaining the writ of *capias;* while he did leave to the jury, instead of deciding himself, the question whether there was reasonable and probable cause for obtaining the writ of *capias.*

The Respondent did not appear.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The Defendants in this case are the Appellants. They appeal against a rule discharging a rule *nisi* obtained by them to set aside a verdict for the Plaintiff and for a new trial. The action was brought by *Samuel Strong* against the *Bank of British North America.* The declaration contains six counts.

The first three counts of the declaration charged the Defendants with falsely and maliciously writing and publishing concerning the Plaintiff the words following; that is to say, "*Insolvent Act* of 1869. To *Samuel Strong* (meaning the Plaintiff) of *Arichat,* in the county of *Richmond,* in the province of *Nova Scotia,* merchant and trader, you (meaning the Plaintiff) are hereby required, to wit, by *John F. Crowe* and *Harlin Fulton*, doing business under the name and firm of *J. F. Crowe & Co.*, creditors for the sum of $247. 40*c.*, the same being for the amount of a certain promissory note bearing date the 6th day of September, A.D. 1873, whereby you (meaning the Plaintiff) promised to pay *A. B. Bligh & Co.*, or order, the said sum of $247. 40*c.*, three months after date; and the said *A. B. Bligh & Co.* indorsed the said note to the said *J. F. Crowe & Co.*, which said note is unpaid, and is and has been overdue since the 9th of December instant; and by the *Bank of British North America* (meaning the Defendants), creditors for the sum of $463. 46*c.*, the same being for the amount of a certain promissory note bearing date the 8th of December, 1873, whereby you (meaning the Plaintiff), promised to pay to *A. B. Bligh & Co.*, or order, the said sum of $463. 46*c.* three months after date; and the said *A. B. Bligh & Co.* indorsed the said note to *James Crawford & Co.*, who indorsed the same to the *Bank of British North America* aforesaid, which said note is unpaid, and is and has been overdue since the 11th day of December instant; and by *William C. Moir*, doing business under the name and firm of *Moir & Co.*, a creditor for the sum of $289. 14*c.*, the same being for the amount of a certain promissory note bearing date the 12th day of September, 1873, whereby you (meaning the Plaintiff) promised to pay *A. B. Bligh & Co.*, or order, the said sum of $289. 14*c.* three months after date; and the said *A. B. Bligh & Co.* indorsed the said note to the said *Moir & Co.*, which said note is unpaid, and is and has been overdue since the 15th of December instant, to make an assignment of your estate and effects under the above Act, for the benefit of your (meaning Plaintiff's) creditors."

The fourth count alleged "that the Defendants falsely and maliciously, and without reasonable or probable cause, joined with others in making and did make a demand upon the Plaintiff in the form referred to in sect. 14 of 'The *Insolvent Act* of 1869,' requiring the Plaintiff to make an assignment of his estate and effects for the benefit of his creditors, merely as a means of enforcing payment of the amount alleged in said demand to be due to the Defendants, under colour of proceeding under the said

J. C.
1876

BANK OF BRITISH NORTH AMERICA *v.* STRONG.

'*Insolvent Act* of 1869,' and that the Defendants, though said demand was served on the Plaintiff in the year 1873, have never since taken any further proceedings thereon."

The fifth count alleged that the Defendant maliciously and without reasonable or probable cause obtained an order authorizing them to issue a *capias* to hold the Plaintiff to bail for the sum of $763. 46*c.*, by falsely and maliciously representing by a false affidavit that the Plaintiff was then about to leave *Nova Scotia* unless forthwith arrested; and that thereupon in pursuance of the said order the Defendants caused a writ of *capias* to be sued out, and the Plaintiff to be arrested thereon, and to be detained in custody until he gave bail; and that afterwards the order to hold to bail and the writ of *capias*, and all proceedings thereunder, were set aside by a Judge on the ground that the Plaintiff was not about to leave *Nova Scotia.*

The sixth count was for assault and imprisonment.

The Defendants, in their pleas, say, "As to the first count of the said declaration, that the Plaintiff being indebted to them upon notes long over due, and being also indebted to other persons upon notes also over due, they, the said Defendants, together with sundry other creditors of the said Plaintiff," that was Messrs. *Crowe & Co.* and another creditor, "caused the notice set out in the Plaintiff's writ to be served upon him, which is the grievance complained of in the Plaintiff's writ." If the notice was so published as to amount to a libel if false, this plea amounted to a justification of it. The Defendants say in substance "We stated that you were indebted; it is true that you were indebted, and we served this notice under the provisions of the *Insolvent Act.*"

Similar pleas were pleaded to the second and third counts.

To the fifth count the Defendants pleaded that, having been informed and believing that the Plaintiff was about to leave the province, they caused proceedings to be taken to recover their debt, which was of long standing.

The evidence was that the Plaintiff being indebted to Messrs. *Crowe & Co.*, and also to the Defendants, the bank, and to other creditors, the Defendants and Messrs. *Crowe & Co.* joined in serving a notice upon the Plaintiff under the statute of the

Canadian Dominion Parliament of 32 & 33 Vict. c. 16. Sect. 14 of that Act enacts, "if a debtor ceases to meet his liabilities generally as they become due, any one or more claimants upon him for sums exceeding in the aggregate $500, may make a demand upon him either personally within the county or judicial district wherein such insolvent has his chief place of business, or at his domicile, upon some grown person of his family or in his employ, requiring him to make an assignment of his estate and effects for the benefit of his creditors."

The debts of the Defendants and of Messrs. *Crowe & Co.* exceeded the amount of $500, and the notice or demand served upon the Plaintiff required him to make an assignment of his estate and effects for the benefit of his creditors. That was a legal proceeding taken for the recovery of the debts. It would not have been sufficient in an action for a malicious prosecution to allege that the notice was served maliciously; but it would have been necessary to go further, and state that there was no reasonable or probable cause for serving it. The notice could not amount to a libel unless it was published to a third person. The Defendants could not be sued for serving a notice of that kind upon the Plaintiff personally, unless there was want of reasonable or probable cause; nor could he be treated as having published a false and malicious libel by publishing it to the Plaintiff himself. Such a notice being a legal proceeding would be *primâ facie* privileged, and no action would lie for the delivery of it to a third person for service upon the Plaintiff, unless upon proof of express malice; but if the Defendant, without having any debt due to him, and knowing that there was no debt due to him, chose to put such a notice into the hands of a third person for the purpose of being served, that would be a publication, and might amount to a libel if express malice were proved. In this case no such proof of malice was given, nor was it shewn, and indeed it could not be shewn, that the debts mentioned in the notice were not due.

Now, with reference to the first three counts, the learned Judge who tried the cause says:—"I stated to the jury that this suit had arisen from a demand made upon the Plaintiff, a trader at *Arichat*, in December, 1873, by the Defendants and others, as his creditors,

J. C.
1876
Bank of British North America v. Strong.

requiring him to make an assignment of his estate and effects for the benefit of his creditors, under sect. 14 of the *Insolvent Act* of 1869, and in consequence of the subsequent arrest of the Plaintiff under a writ of *capias*, issued against him by the Defendants for the same debt claimed to be due to them in that demand. I explained to the jury what, in point of law, constituted a libel, in order that they might consider whether the matters contained in the three first counts of the writ were libellous or not, remarking that, if the Plaintiff had ceased to meet his liabilities to the Defendants and other persons acting with them, they had a right to make, and were therefore not chargeable with libel for making, the demand." He then proceeded to state that the Defendants did not follow up the notice, and that afterwards they abandoned the proceeding, and arrested the Plaintiff upon the notes. He says, subsequently:—"I remarked that in actions like the present for a malicious arrest, malice was an essential ingredient, and wherever it was put in issue under a plea of not guilty," that is speaking of the fifth count, "it was the duty of the Plaintiff to give some evidence of it, and also evidence of the want of probable cause for such arrest. Here malice was not directly put in issue under the plea to the fifth count, upon which count I told them I thought the whole of this case rested." It appears, therefore, that the learned Judge, after directing the jury as to the law relating to libel, told them in substance that he thought there was no libel.

He also stated that he thought the charge under the fifth count was the one upon which the whole case rested. Then he summed up to the jury upon that count. He said, "The Defendant having merely pleaded to that count, that having been informed and believing that the Plaintiff was about to leave the province, they caused proceedings to be taken to recover their debt, long overdue, leaving it to be inferred from the facts stated in the plea, that there was no malice, though the plea itself did not deny it. Whether there was or was not reasonable and probable cause for instituting the suit complained of by the Plaintiff was a question I had on motion for a nonsuit refused to decide, considering it a question that in this case ought properly to be decided by them upon the evidence adduced. They were aware that the suit brought by Defendants against the Plaintiff was upon two promissory notes made by the Plaintiff to *A. B. Bligh & Co.*, indorsed by that firm and also by the firm of *James Crawford & Co.*, and discounted by the Defendants, as Mr. *Penfold* had stated, on the strength and credit of the indorsers only, the maker being considered by him as a person of no means or credit, whose name upon any paper upon which it appeared he thought would be prejudicial to it; they were also aware that no recourse was had by the Defendants against the indorsers who, though they had met with some reverses in their business, were yet solvent. Now these were the facts upon which the Plaintiff relied as evidence; first of all, to shew that there was malice and want of probable cause on the part of the Defendants in issuing a writ of *capias* against him and causing him to be arrested, and, in the next place, stating in their affidavit a belief that he was about to leave the province, and falsely stating that they feared the debt would be lost unless he was forthwith arrested." Then he says, "Mr. *Penfold*," that is the agent of the bank, "states that he received information from *Emerson Bligh*, a partner in the firm of *A. B. Bligh & Co.*, whose interest it was, as he must have known, that the notes made by the Plaintiff and held by Defendants with the indorsement of his firm should be collected; but having some doubt as to the propriety of proceeding against him in the manner suggested by *Emerson Bligh*, he consulted his solicitor, who told him he could safely arrest the Plaintiff on the information he had received. Whether the advice given was such as I, having heard the facts, approved of, I would not say; but I felt it to be my duty to say, that if they believed that Mr. *Penfold*, after having laid all the facts fully and fairly before his solicitor, acted *bonâ fide* on his opinion, and solely with the view of protecting the interests of the Defendants, whose servant he was, believing the debt would be lost unless the Plaintiff was arrested, then it was evidence of probable cause, and then the verdict ought to be for the Defendants; but if they could not come to that conclusion, and thought that he acted more with a view of protecting the interest of the indorsers than that of the Defendants, and did not himself believe, and could not have believed from the opinion he had expressed as to the Plaintiff's credit, that the debt would be lost unless he was

J. C.
1876
Bank of British North America v. Strong.

arrested, then it was evidence of the want of reasonable and probable cause for making the arrest, which would entitle the Plaintiff to a verdict for such damages as they considered right, though the fact of the writ of *capias* having been set aside would not amount to evidence of that character."

The Respondent did not appear before their Lordships at the hearing of the appeal, but the Colonial Act for abolishing arrest for debt on mesne process (Revised Statutes of *Nova Scotia*, Fourth Series, c. 94) was brought to their notice.

Their Lordships are of opinion that the Act, in requiring an affidavit from a creditor that he fears the debt will be lost unless the debtor is immediately arrested, has reference to a loss of the debt, so far as the debtor himself and any security which he may have given for the debt are concerned. In the present case, the Plaintiff, as the maker of the notes, was the debtor; the debts were not debts due from the Plaintiff and the indorsers jointly; the indorsers were not sureties provided by the Plaintiff for securing the debt; and although the Defendants might have sued the indorsers upon the notes if due notice of dishonour were given, they were not bound to adopt that remedy, or to look to them for payment, but were entitled to treat the Plaintiff as the sole debtor, and to adopt the same remedy against him as they would have adopted if they had been payees of the notes, or as the indorsers would have had if they had taken up the notes and sued the Plaintiff upon them. The false and malicious representation charged in the fifth count was the representation that the Plaintiff was about to leave *Nova Scotia*, when, in fact, he was not about to leave it; and it was upon the ground that he was not about to leave, and upon that ground alone, that the writ of *capias* and the proceedings thereunder were set aside. There was no allegation that the representation by the Defendants that they feared the debt would be lost if the Defendant were not forthwith arrested, was false or malicious. Their Lordships are of opinion that, if the Defendants had reasonable and probable cause for believing and did believe that the Plaintiff was about to leave *Nova Scotia*, and that their remedy against him would be lost, and that they would be prevented from recovering their debt from him, if he were not forthwith arrested, there was reasonable and probable cause for the arrest, notwithstanding they might have believed that they could recover the amount of the note from the indorsers, and in endeavouring to recover their debt from the Plaintiff acted with a view of protecting the interests of the indorsers.

It appears, therefore, to their Lordships that the learned Judge misdirected the jury with regard to the fifth count, and that the direction as to that count would of itself justify a new trial. The grounds upon which the new trial was moved for were,—first, "That the learned Judge did not submit the question of malice to the jury; secondly, that evidence of damages under the counts for libel was improperly received; third, that the verdict was general; and, fourth, that the learned Judge left the question of want of reasonable or probable cause to the jury instead of deciding it himself."

The learned Judge who delivered the judgment of the Court upon the rule for a new trial, said: "On the first point I think it is a mistake to assume that nothing was submitted to the jury upon the question of malice, as the learned Judge reported that he had explained to them what constituted libel, and that he remarked that in an action for malicious arrest malice was an essential ingredient, and that whenever it was put in issue it was the duty of the Plaintiff to give some evidence of it. We are not now called upon to decide under a demurrer, as in the case of *Strong* v. *Crowe*, whether the counts for libel do or do not disclose a good cause of action. The Defendants have not met the three first counts either by demurrer upon the question of law or by plea denying the material allegations which they contain of publication, falsity, and malice, and, therefore, as has been said at the argument, the question at the trial was one of damages. The question now is, whether or not the verdict can be upheld under the pleadings as they stand? And I fail to see why evidence of damages could not be received under these counts for libel, unanswered as they are. If so, and if the jury were justified in giving damages also under the fifth count for the arrest, the fourth being for the same cause of action as the first, second, and third, and the sixth having been withdrawn from the consideration of the jury, I can see no valid objection to the general verdict."

The general verdict, including damages in respect of the first three counts, therefore, was justified upon the ground that the pleas of the Defendants to those counts did not deny the material allegations which they contain of publication, falsity, and malice. But the pleas to those counts were, "That the Plaintiff being indebted to the Defendants upon notes long overdue, and being also indebted to other persons upon notes also overdue, they, the said Defendants, together with sundry other creditors of the said Plaintiff, caused the notice set out in the Plaintiff's writ to be served upon him, which is the grievance complained of in the Plaintiff's writ." They contain an argumentative denial that the notice was published to any other person than to the Plaintiff himself, in which case it would not be a libel. But whether this was or was not a denial of the publication, the pleas certainly contained a denial of the falsity of the charge, for the Defendants say that it was true that the Plaintiff was indebted to them upon notes long overdue, and that he was also indebted to other creditors. That was an allegation that the notice contained a true statement of facts, and therefore it did deny the falsity, and denied it in the proper manner. When the Defendants justified the publication by alleging that the facts stated were true, it was not necessary for them to deny malice. Truth is a justification. Therefore, even if there were not an argumentative denial of publication, there was a denial of the falsity, and there was no necessity to deny the malice.

It appears, therefore, to their Lordships, that the Court came to a wrong conclusion in holding that the Defendants admitted the publication, the falsity, and the malice charged in the first three counts of the declaration, and that, therefore, the jury were justified in giving a general verdict, including damages upon those counts.

For these reasons their Lordships think that the Defendants were entitled to a new trial, and that the Court, instead of discharging the rule nisi, ought to have made it absolute. They will, therefore, humbly recommend Her Majesty that the rule discharging the rule nisi for a new trial be set aside, and that the rule nisi be made absolute. Their Lordships think that the Respondent ought to pay the costs of this appeal. The costs of the new trial will be directed by the Court below in the ordinary way.

Solicitors for the Appellant: *Bischoff, Bompas, & Bischoff.*

[PRIVY COUNCIL.]

J. C.

1876

March 17, 18, 23, 24; April 7.

CHARLES MOORE AND BERRY MOORE . PLAINTIFFS;

AND

DAVID HARRIS . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, IN THE PROVINCE OF QUEBEC.

Bill of Lading—Shipowner's Liability for Damage—Condition as to Delay in making Claim.

By a bill of lading made in *England* by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of *Montreal*" . . . "unto the *Grand Trunk Railway Company*, and by them to be forwarded thence per railway to the station nearest to *Toronto*, and at the aforesaid station delivered to the consignees or to their assigns."

The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed."

In an action in the Superior Court of *Lower Canada* against the shipowner for the value of damage done to the said packages during the voyage, it appeared that the same were landed, placed in certain shipping sheds, removed therefrom to railway freight-sheds in *Montreal*, and finally delivered to the consignees in *Toronto*. No notice of damage was given until thirteen days after the delivery was completed:—

Held, that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages conducted with reasonable care and skill at the place of removal have been discovered.

The bill of lading in this case was a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein; notwithstanding the provisions of Article 1680 of the Canadian Civil Code.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada*, in the province of *Quebec* (September 22, 1874) affirming the judgment of the Superior Court of *Lower Canada* in the district of *Montreal* (December 30, 1872) in favour of the Defendant, the Respondent above named.

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

The facts and pleadings are sufficiently stated in the judgment of their Lordships.

The judgment of the Superior Court was as follows:—That the Court

"Considering the Plaintiffs have failed to establish a right to a judgment against the Defendant in the present cause or action;

"Considering that some of the material allegations of their declaration are unproved, and some of them disproved;

"Considering that the conduct of consignees of goods carried by common carriers ought to be frank and loyal towards the carriers in all cases in which it is claimed against them that goods carried have been lost or damaged during the carriage;

"Considering that the Defendant was bound to deliver all the teas he got to carry for Plaintiffs, and in the condition in which he got them, and if they be damaged, must pay damages according to their less value, and that Plaintiffs were bound to receive said teas if not totally unmerchantable and good for damages (proper indemnity), and if meaning to take the position that the teas were totally unmerchantable ought to have offered to give them up to Defendant for his own account, and to have notified him to that effect, and thereafter charge him as in case of total loss;

"Considering that Plaintiffs by their declaration charge Defendant as for total loss of the teas referred to, which are said to be lost and 'utterly worthless,' that the Plaintiffs, nevertheless, received the teas, which have not even yet been fairly enough examined to warrant Plaintiffs charging Defendant as they do;

"Considering that Plaintiffs have never abandoned said teas to Defendant, nor notified him to that effect, but have actually refused to allow him (by his agents and servants in that behalf) to take samples of them as he wished, the Plaintiffs so retaining (even after the institution of the present action) a possession of said teas adversely to Defendant;

"Considering it plain that the said teas, instead of being 'utterly worthless,' have a material value, and would sell for a large sum of money, probably over $6000;

"Considering Plaintiffs' treatment of Defendant arbitrary, and that their present suit or action cannot be maintained, doth dismiss said Plaintiffs' action, and doth declare the attachment in this cause dissolved, the whole with costs."

The judgment of the Court of Queen's Bench (*Dorion*, C.J., *Taschereau, Ramsay, Sanborn*, JJ., *Monk*, J., dissenting) confirmed the said judgment with costs,

"Considering that the Plaintiffs in the Court below have failed to establish by proof the allegations of their declaration, and particularly the quality of the tea in question when shipped, or that the said tea was damaged while on board the *Medway*.

"Considering, further, that the Plaintiffs did not use due diligence in notifying the Defendant in the Court below of the alleged damage to the said tea;

"Considering that in the judgment appealed from there is no error."

Mr. *Cohen*, Q.C., and Mr. *R. Vaughan Williams*, for the Appellants, submitted that not only were the decisions appealed against wrong in so far as they were adverse on the question of fact raised, but also that those decisions were erroneous in point of law. The judgment of the Superior Court was founded upon the erroneous assumption that the consignee of goods cannot recover against a carrier the value of goods which have been so damaged by the negligence of the carrier as to be rendered worthless, without abandoning the goods to the carrier; and on the further erroneous ground that where a consignee of goods alleges in an action against a carrier that goods had been so damaged as to be rendered valueless, he cannot, if he fail to prove damage to the full extent alleged, recover for the actual damage which he does prove.

Then as to the judgment of the majority of the Court of Queen's Bench, to the effect that there was no evidence of the quality or condition of the tea when shipped, they submitted that there was no rule of law which required the Plaintiff in such a case to shew in the first instance that the goods were shipped in good order and condition, or fail in his suit. It is sufficient if a Plaintiff gives, as they contended the Plaintiffs had done in this suit, cogent evidence that the damage which the cargo sustains is traceable to causes for which the shipowner is responsible. The bill of lading in this case was itself some evidence of the quality of the tea when shipped. So far as that judgment proceeded upon Article 1680 of the Canadian Code, which says, "The reception of the thing transported and payment of freight, extinguishes all right of action against the carrier, unless the loss or damage is such that it could not be known, in which case the claim must be made without delay after the loss or damage becomes known to the claimant," they contended that at the time of the payment of freight the Appellants did not know and could not have known of the damaged state of the tea, and that, therefore, the article had no application. The only obligation on the Appellants was to give notice to the Respondent, which they did, of the damaged condition of the tea within a reasonable time after they became aware of it. Delay in giving such notice affected only the weight of the evidence adduced by the Appellants, and not, according to the true construction of the condition in the bill of lading, the liability of the Respondent in cases like the present, where the damage was latent and not to be discovered until after examination held for that purpose. The condition clearly referred to the removal of the goods from the ship at *Montreal,* and could not reasonably be construed so as to relate to any damage but that which was actually apparent, or could be readily discovered without examination for that purpose.

They referred to *D'Arc* v. *London and North Western Railway Company* (1); *Czech* v. *General Steam Navigation Company* (2); *Toms* v. *Wilson* (3); *Mitchell* v. *Lancashire and Yorkshire Railway Company* (4); *Taubman* v. *Pacific S. N. Company* (5); *McCawley* v. *Furness Railway Company* (6).

Mr. *Watkins Williams,* Q.C., and Mr. *Lumley Smith,* for the Respondent, contended that the evidence wholly failed to shew that the teas were damaged through the Respondent's negligence. The bill of lading limited the liability of the Respondent to the invoice value of the goods, and there was no satisfactory evidence that the value of the teas at *Toronto* was less than the invoice value. They also argued that the excepted perils mentioned in the bill of lading covered the damage done in this case, and exempted the Respondent from liability. They referred to the condition in the bill of lading, and contended that the responsibility of their client ceased on delivery of the goods at *Montreal*, where no claim for damage or loss was made by the Appellants. Whatever loss or damage existed was known to the Appellants before the 18th of May, for they held an *ex parte* survey on that day; but no notice was given to the Respondent or his agent until the 3rd of June. By receiving the tea, and keeping it in their possession for nearly three weeks without giving notice, the Appellants forfeited the right to make the claim put forward in this suit. See the condition of the bill of lading, and Article 1680 of the Civil Code of *Lower Canada*, under which article reception of the teas, and payment of freight without protest, extinguished the Appellants' right of action against the Respondent; otherwise, and without such protection, carriers would be constantly exposed to false and unfounded claims, without any adequate means of self defence. That condition, in the second clause thereof, expressly relates to "any claim whatever," and cannot be limited to claims in respect of apparent damage. Such a construction would be contrary to the whole scope and tenor of the instrument, the intention of which was to protect the shipowner from responsibility as much as possible. Moreover, the damage alleged in this case was of a nature that could readily have been discovered either at *Montreal* or *Toronto* by those who took delivery. The condition of the bill of lading was not unreasonable, and might with ordinary diligence have been complied with by the consignees. They referred to *Chapman* v. *Gwyther* (1); *Smart* v. *Hyde* (2); *Kish* v. *Cory* (3).

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(1) Law Rep. 9 C. P. 325.
(2) Law Rep. 3 C. P. 14.
(3) 4 B. & S. 442. 9 Jur. N.S. 491 – 10 W.R. 201
(4) Law Rep. 10 Q. B. 256.
(5) 26 L. T. (N.S.) 704.
(6) Law Rep. 8 Q. B. 57.

Mr. *Cohen*, Q.C., replied.

1876
April 7.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the Court of Queen's Bench for *Lower Canada*, affirming a decree of the Superior Court, which dismissed the Plaintiffs' action.

(1) Law Rep. 1 Q. B. 463.
(2) 8 M. & W. 723.
(3) Law Rep. 10 Q. B. 553.

The Appellants, who are merchants in *Toronto*, brought the action against the Respondent, the owner of the steamship *Medway*, one of a line of steamers between *London* and *Montreal*, for the value of the damage alleged to have been done to 306 packages of tea on the voyage from *London* to *Montreal*.

By the bill of lading, signed in *London* by the master's agent on the 12th of April, 1870, the 306 packages were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of *Montreal*," . . . . "unto the *Grand Trunk Railway Company*, and by them to be forwarded thence per railway to the station nearest to *Toronto*, and at the aforesaid station delivered to Messrs. *Charles Moore & Co.*, or to their assigns." The exception contains a long list of special risks, besides general perils of the sea, whether arising from negligence or otherwise. The instrument also contains the following condition, upon the last clause of which a material question arises:—

"No damage that can be insured against will be paid for, *nor will any claim whatever be admitted unless made before the goods are removed.*"

The case of the Plaintiffs, as stated in their declaration, was that during the voyage the tea "had become impregnated and affected with the odour and taste of chloride of lime and other injurious substances," and that the damage so occasioned was not within any of the exceptions of the bill of lading. The defence, stating it generally, was (1), that the tea was not damaged on board the ship; and if it was, that in one way of accounting for it, the injury was within the excepted risks; and (2), that the claim was barred by the delay which occurred in making it.

The evidence for the Plaintiffs was to the effect that, during the voyage, scarlet fever broke out among the steerage passengers, and, under the advice of the surgeon, chloride of lime and carbolic acid were employed as disinfectants. That the chloride was thrown in large quantities about the fore cabin and other parts of the ship occupied by the passengers, and carbolic acid sometimes used in the same places, appears to have been satisfactorily proved. The Plaintiffs' packages—how many of them did not appear—and packages of tea belonging to other consignees were stowed in the hold under this cabin, and the passengers' trunks were in a place near them. The passengers, it is said, suffered greatly during the voyage from the smell of the disinfectants, and when their trunks were opened on shore the clothes contained in them were found to be strongly impregnated with the same odour. The ship arrived at *Montreal* on the 2nd or 3rd of May, having sailed from *London* on the 14th of April.

There were, in all, 4000 or 5000 packages of tea on board dispersed in various parts of the ship. The Plaintiffs' were landed with the others, and all were placed in shipping sheds, where they were sorted, and then taken to the freight sheds of the *Grand Trunk Railway Company*. From thence they were carried by railway to *Toronto*, and deposited in the railway company's bonded warehouses there. After lying a day or two in these warehouses the packages were carried in the railway company's waggons to the Plaintiffs' own warehouse.

The unloading of the ship occupied several days, and the Plaintiffs' packages were forwarded in three lots. These lots were removed from the shipping sheds to the railway freight sheds in *Montreal* on the 6th, 9th, and 12th of May, and were respectively delivered at the Plaintiffs' warehouse in *Toronto* on the 13th, 16th, and 17th of May.

Much evidence was given as to the storing and transport of the packages after they left the ship, to exclude the supposition that they were damaged in their transit from the ship to the Plaintiffs' warehouse.

It appears that upon the arrival of some of the packages at the Plaintiffs' warehouses, their shipping clerk and foreman, *Macfarlane*, perceived a peculiar smell in them, and called the attention of the carmen to it.

On the 18th of May the Plaintiffs called in four persons, viz., two grocers, a merchant, and a tea broker, to examine the tea, and obtained from them the following report, which was sustained by their evidence given in the cause:—"We find the entire lot damaged and unmerchantable. The damage appears to have been caused by chloride of lime, or some other chemical. We find the packages impregnated with the odour, as also the contents."

On the 27th of May another survey of the tea was held for the purpose of obtaining a return of duty, and the surveyors then called in reported damage to the extent of 99 per cent.

No notice whatever of the damage or of these surveys was given to the captain or agent of the ship until the 30th of May, when the solicitors of the Plaintiffs wrote to Mr. *Shaw*, the agent for the ship at *Montreal*, informing him that "the tea upon its arrival was found to have been spoiled and rendered almost worthless by reason of its having been improperly carried," and inviting him to be present at a survey of the tea proposed to be held on the 9th of June. To this letter, which was received by Mr. *Shaw* on the 3rd of June, no answer was returned. The survey, however, took place, and a report in substance the same as that of the 18th of May was made.

Other evidence was given by the Plaintiffs, but none as to the condition of the tea when shipped.

The Defendant called witnesses to rebut the presumption that the damage was done in the ship, and among them stevedores and others who were present when the cargo was discharged, and say that as far as they observed, the floors over the hold were tight, and the packages undamaged; but it is remarkable that none of the officers or crew of the ship were examined.

Mr. Justice *Mackay*, the Judge of the Superior Court, who tried the cause, does not seem to have grappled with the question, whether the tea was damaged in the ship. The "*considérants*' of his judgment are principally directed to the conduct of the Plaintiffs in delaying to make their claim, and in exaggerating the extent of the damage; and it can only, if at all, be inferred that this question was decided by him in the negative from the general "*considérant*," "that some of the material allegations of the declaration are unproved, and some of them disproved."

Ther Lordships, however, have had the advantage of seeing the reasons given by the Judges of the Court of Queen's Bench, and the majority certainly find the question of fact against the Plaintiffs. But the learned Judges in dismissing the action rest their decision principally upon other grounds, and their opinion on the question of fact is evidently not a firm one. It is based on what they consider the insufficiency of the evidence, and especially on the absence of proof of the condition of the tea when it was shipped.

Their Lordships cannot but think that the Plaintiffs' evidence, although on some points open to unfavourable comment, does on the whole make out a strong *primâ facie* case that the damage was done in the ship, and that the presumption arising from it is greatly strengthened by the conduct of the Defendant in declining to call any of the officers or crew of the ship to explain in what manner and under what conditions the chloride of lime and carbolic acid were used, and the state of the ship during the voyage.

They also think that the Judges gave undue weight to the consideration that the Plaintiff offered no proof of the condition of the tea when it was shipped. There is not, and, in the nature of things, cannot be, any general rule of law or evidence on the subject. It must depend on the circumstances of each case, how far such proof is necessary, and the case is to be regarded as inconclusively proved without it. Where, for instance, a cargo of grain is found to be heated—a damage which may arise either from its bad condition when shipped, or from some cause existing in the ship—it may be essential to prove the state of the cargo before its shipment. But where, as in this case (supposing, of course, the evidence to be believed), noxious substances, calculated to produce the peculiar damage actually present, are found to have been used in close proximity to the tea, cause and effect are so nearly brought together that a conclusion can be reached without proof of its condition at the time of shipment.

Their Lordships would have thought it right to discuss the evidence with greater minuteness, if overruling the finding of the Judges on the question of fact would have led to the reversal of the judgment under appeal. But their opinion being adverse to the Appellants on another part of the case, it is enough to say that they are not so satisfied of the correctness of the conclusions of the Judges below on that question as to be able to advise Her Majesty to rest her affirmance of the judgment appealed from upon them.

It is also unnecessary, after what they have just intimated, for them to consider the point raised by Mr. *Watkin Williams,* that in one way of accounting for the damage, the injury, if done in the ship, would fall within the excepted perils mentioned in the bill of lading.

Their Lordships will now proceed to the defence founded on the condition in the bill of lading, that no claim whatever for damage will be admitted unless made before the goods are removed.

It was not, and could not be denied, that this condition, stringent as it is, was binding on the consignees; but its application to the claim in question was disputed. It was contended that "before the goods are removed" meant removal from the ship at *Montreal,* and not from the railway station at *Toronto;* and that the condition applied only to apparent damage, and the injury sustained by the tea was not such damage.

There is undoubtedly difficulty, owing to the ambiguous language and inconsistent provisions of the bill of lading, in determining whether the removal referred to was that from the ship or the railway station. The construction most consistent with the rest of the instrument seems to point to the latter place. It was at the railway station that in express terms the goods were to be delivered to the Plaintiffs, "freight being payable by the consignees as per margin;" this freight being, as it was admitted, a through freight from *London* to *Toronto.* By another clause it is provided that "goods must be taken away within twenty-hours after arrival at the railway station to which they are destined." Again, freight is made due, if payable by consignees, "on arrival at the place of destination." On the other hand it was pointed out that it is provided that the goods are to be delivered from the ship's deck, where the ship's responsibility shall cease, and this delivery is to be to the railway company; but although the liability of the ship for the subsequent damage then ceases, it would be the duty of the ship to contract with the railway company to carry on the goods to *Toronto,* and, as already observed, the railway station is spoken of as the place of destination, and it is there the goods are to be delivered to the Plaintiffs.

The clause, "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the expense of the consignee, and at his risk"—is no doubt opposed to the above construction, but this clause is inconsistent with the engagement of the shipowner to send on by railway at a through freight to *Toronto.* It is evidently one of the printed clauses, and cannot control the specific undertaking to forward the goods to *Toronto.*

Mr. *Cohen*, in insisting that the condition referred to the removal from the ship, desired to assist his main contention that the condition should be confined to claims for apparent damage, since there being, as he said, little opportunity for examination on a delivery from the ship's side, it would be unreasonable to suppose the parties intended it to apply to claims other than for such damage. Supposing, however, removal from the ship was meant, that construction would not, in their Lordships' view, materially assist his contention; for in that case the railway company would be the agents of the Plaintiffs to receive the goods from the ship, and if the Plaintiffs, who had come under this stringent condition, were not content to leave the examination of the packages to the officers of the company, they should have taken care to employ a competent agent for that purpose. There were shipping sheds on the wharf alongside the ship in which the packages on being landed were placed, and where the goods remained in charge of the agents of the ship, who sorted and afterwards delivered them to the railway company's servants. There is no reason for supposing that opportunity would not have been afforded in these sheds for inspecting and examining the packages.

But the principal contention on behalf of the Plaintiffs was that, whichsoever was the place of removal referred to, the condition should be confined to apparent damage. Now its language is plain, and without any ambiguity. The first branch of it, "no damage that can be insured against will be paid for," although limited to insurable damage, clearly applies to such damage, whether apparent or latent. The words of the last branch are unlimited and universal—"any claim whatever." It was not indeed denied that these words would in their natural sense include all damage, but it was said they should be construed as the usual acknowledgment found in bills of lading, "shipped in good condition," has been, and confined to external and patent damage. It is to be observed, however, that although the general understanding may have been so to limit the words of this acknowledgment it is not an uncommon practice to qualify them by such expressions as "weight, value, and contents unknown."

But in truth the supposed analogy does not exist. This is a condition for the shipowners' benefit, and it may well be that stale claims for latent damage were those against which he most desired to guard. Tea is an article peculiarly liable to such damage. It may be injured not only by contact with, but by the vapours or odours arising from, other substances, as in this case from chloride of lime. In the long voyage from *China*, even if sound when shipped, and in the removal and storage of it in *England*, it may have been subjected to noxious influences which would spoil or deteriorate its condition without any external appearance of damage. Its susceptibility to similar injury would of course also exist after it was taken from the ship and stored or otherwise dealt with by the merchant. A shipowner may choose to say, I will not be liable for any damage to an article of this kind, unless a claim is made so that it may be looked into and checked by my agents before the goods are removed from their control. And when a condition to this effect is found in a bill of lading, expressed in language which in its ordinary and natural sense includes all damage whether latent or not, can the Courts undertake to say it is so unreasonable that the parties could not have meant what they have said? No doubt this condition may bear hardly on consignees, but so also may the very large exceptions to the responsibility of the shipowner inserted in the body of this bill of lading. Certainly no reasons for narrowing the scope of the condition can be gathered from the general tenor of the instrument, which is manifestly framed throughout with a view to exempt the shipowner (as far as could be foreseen) from liability for damage. It may be that this has been done to an unreasonable extent, but the Plaintiffs are merchants and men of business, and cannot be relieved from an improvident contract, if it really be improvident. Possibly in shipping under bills of lading thus framed, the merchant gets a corresponding advantage in a lower rate of freight.

None of the cases cited at the bar bear a close analogy to the present. The decisions relating to conditions common in the sales of horses, providing that the liability on the warranty shall cease at a certain date, were referred to, in which it has been held that latent defects are within them (see *Smart* v. *Hyde* (1); *Chapman* v. *Gwyther* (2)).

Reference was also made to a well-known class of decisions on

(1) 8 M. & W. 723.

(2) Law Rep. 1 Q. B. 463.

policies of fire insurance, in which conditions, requiring claims to be sent in within specified periods, have been strictly construed. In a recent appeal before this tribunal from the Court of Queen's Bench in *Canada* (*Whyte* v. *Western Assurance Company*), in which a question arose whether the period of thirty days for sending in proofs of the claim was a material part of the condition, Lord Justice *Mellish*, in delivering the opinion of the Committee, observed: "It was said that, although it was a condition precedent that the proofs should be sent in, yet the period of thirty days was not material; but if that were so, then there would be no time at all appointed within which the proofs were to be sent in, and the assured might wait one or more years before he sent in his proof, and still be entitled to recover, which would appear to be entirely contrary to the true meaning of the condition." Exactly the same consequences, if the Plaintiff's construction of the condition were to prevail, might happen in this case, and would be equally opposed to its meaning.

But if any limitation of the condition could be implied, it could not reasonably go further than to exclude such damage only as could not on an examination of the packages, conducted with proper care and skill at the place of removal, have been discovered, and their Lordships think it appears upon the evidence that if such an examination had taken place, either at the shipping sheds at *Montreal* or the railway station at *Toronto*, the damage complained of might have been discovered. The odour of chloride of lime, even from the packages themselves, was very strong. A peculiar smell was perceived by *McFarlane*, the Plaintiffs' foreman, as soon as they were delivered, and he not only called the attention of the railway carmen to it, but made a memorandum on some of the receipts that the packages were damaged.

Again, Mr. *Mills*, a witness, whose tea formed part of the *Medway's* cargo, upon examining his packages on the wharf at *Montreal* on the day they were landed, discovered that they were damaged by chloride of lime and carbolic acid. He says the smell was quite perceptible.

The surveyors, also, who examined the Plaintiffs' tea on the 18th of May, report that they found "the packages," as well as

J. C.
1876
MOORE
v.
HARRIS.

the contents, impregnated with the odour of chloride of lime. It is true the stevedores employed in unloading the ship say they did not observe any smell about the packages; but they do not appear to have examined or even handled them.

Their Lordships cannot doubt that if a competent agent of the Plaintiffs, like *McFarlane,* had been ready to receive the packages, either at the shipping sheds or the railway station, the smell would have been at once detected by him, and, having detected it, he might without difficulty have further examined the tea by taking and testing samples from the packages in the simple and usual manner described by the surveyors. The damage would then have been fully disclosed, and a claim in respect of it might have made before the packages were removed.

The opinion of their Lordships, whilst it sustains the second "*considérant*" of the judgment under appeal, rests entirely on the express condition in the bill of lading. Some of the learned Judges below gave the same effect to it; but all of them found their decision, in part at least, upon the maritime law of *France,* and Article 1680 of the Canadian Civil Code, applying the principles derived from these sources to what upon the evidence they deem to be unreasonable and unfair delay on the part of the Plaintiffs. It is often useful, especially in mercantile cases, to refer for illustration to the laws and usages of countries other than that whose law governs the particular case. But the Judges seem to have gone further, and to have thought that a substantive defence arising from the delay might be founded upon their own law. Their Lordships, therefore, think it right to observe that, in their opinion, the bill of lading, having been made in *England* by the master of an English ship, is a contract to be governed and interpreted by English law, and that, whilst the presumptions arising from the conduct of the Plaintiffs may properly be regarded in determining the question whether the damage was in fact done, as they assert, in the ship, neither their conduct, nor the delay in making the claim, would constitute by English law an answer to the action, apart from the express condition in the bill of lading (see *Peninsular and Oriental Company* v. *Shand* (1); *Lloyd* v. *Guibert* (2)).

(1) 3 Moore's P. C. (N.S.) 272. 11 Jur N.S. 771

(2) 6 B. & S. 100. 10 Jur N.S. 949.

J. C.
1876
MOORE
v.
HARRIS.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

Solicitors for the Appellants: *Pugh, Cooper, & Holmes.*
Solicitors for the Respondents: *Parker & Clarke.*

[PRIVY COUNCIL.]

J. C.*
1875
July 13, 15, 20.
1876
Feb. 16; *March* 28.

DAMODHAR GORDHAN . . . . DEFENDANT;

AND

DEORAM KANJI, DECEASED, BY HIS SONS AND HEIRS . . . . } PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, AT BOMBAY.

Cession of British Territory—Prerogative of the Crown to cede Territory—Transfer of Jurisdiction—Concurrence of Imperial Parliament—Indian Evidence Act, 1872, s. 113.

In the province of *Kattywar*, subject in its entirety since 1820 to the supreme authority of the British Government, the Thakoor of *Bhownuggur* was possessed of certain talooks, which had never been brought under the ordinary British administration, and in which the Thakoor exercised a wide civil and criminal jurisdiction, subject only to the supervision, laws, and regulations of the *Kattywar* Political Agency. He was also possessed, within the same province, of other talooks, including *Gangli* which in 1802 had been ceded to the British Government and in 1815 had been placed under the ordinary jurisdiction of the British Courts of the *Bombay* Presidency. In 1848, *Gangli* was included in a lease granted by the British Government to the Thakoor, which by mutual agreement, dated the 23rd of October, 1860, was cancelled, and thereunder the British Government conceded as a favour, not as a right, the transfer of *Gangli* and other territories from the district of *Gogo* which was subject to the regulations, to the districts under the control of the *Kattywar* Political Agency. Delay having arisen in completing this transfer, the Governor General in Council, on the 31st of May, 1865, authorized its completion, "Her Majesty's Secretary of State having decided that *Kattywar* was not British territory." Thereafter, on the 29th of January, 1866, it was notified, in effect, in the *Bombay Government Gazette* that *Gangli*, by reason of the cession thereof by the British Government to the Thakoor of *Bhownuggur*, was removed from and after the 1st of February of that year from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency. And on the 4th of January, 1873 (after the *Indian Evidence Act*, 1872, had come into force), it was notified in effect in the Indian *Gazette* that *Gangli* was, on the 1st of February, 1866, ceded to the state of *Bhownuggur*.

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* *Present*:—THE LORD CHANCELLOR (Lord *Cairns*), LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Previous to the notification in 1866, a decree for redemption of mortgaged land situate in *Gangli* was made by the British Court of *Gogo*, and reversed by the Judge of *Ahmedabad*; the case being subsequently remanded by the High Court at *Bombay* to the Judge, who thereupon restored the original decree, notwithstanding that in the interval the first-mentioned notification had appeared. The High Court confirmed this order, holding the notification to be insufficient to prove a transfer of jurisdiction. In review of this order, the High Court confirmed the same, on the ground that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in *India* in time of peace to a foreign power:—

Held, by their Lordships, that the appeal from this last-mentioned order passed in review must be dismissed.

The jurisdiction of the Courts of the *Bombay* Presidency over *Gangli* rested in 1866 upon British statutes, and could not be taken away or altered (as long as *Gangli* remained British territory), so as to substitute for it any native or other extraordinary jurisdiction, except by legislation in the manner contemplated by those statutes.

The transfer of British territories from ordinary British jurisdiction to the supervision, laws, and regulations of a political agency, by excluding such territories from the British regulations and codes theretofore in force therein, and from the jurisdiction of all British Courts theretofore established therein, with a view to the substitution of a native jurisdiction under British supervision and control, cannot be made without a legislative Act.

Such transfer of jurisdiction, even if valid, would not amount to a cession of British territory to a native State; nor would it deprive the Crown of its territorial rights over the transferred districts, or the persons resident therein of their rights as British subjects. Although their Lordships entertained grave doubts (to say no more) as to the concurrence of the Imperial Parliament being necessary to effect such cession of territory, yet such cession is a transaction too important in its consequences, both to *Great Britain* and to subjects of the British Crown, to be established by the above decision attributed to the Secretary of State, or by any uncertain inference from equivocal acts.

THIS was an appeal from a decree of the High Court of *Bombay*, made on review on the 24th of March, 1873, whereby that Court refused to vary their previous decree, dated the 2nd of December, 1870, affirming, on special appeal, a decree of the Assistant Judge of *Ahmedabad* of the 11th of August, 1867, which affirmed a decree of the Moonsiff's Court, dated the 19th of April, 1865.

On the 3rd of September, 1864, *Deoram Kanji*, deceased, an inhabitant of *Gangli*, filed his plaint in the Moonsiff's Court at

Gogo, against the Appellant, *Damodar Gordhan*, and *Naran Kalyanji*, and *Laoji Kalyanji*, claiming to redeem a piece of land situate in the village of *Gangli*, which had been, as *Deoram* alleged, in the year 1812 given by him in ghas-gharemya, or mortgage, for the purpose of securing Rs.60 to one *Gordhan Harnath*, the father of the Appellant *Damodar Gordhan*. Ghas-gharemya was explained to be "a mortgage with possession, under which the produce of the land is taken instead of interest."

At the date of the institution of the suit the village of *Gangli* formed part of the pergunnah of *Gogo*, in the zillah of *Ahmedabad*, in the Presidency of *Bombay*.

On the 26th of September, 1864, the Appellant and the other Defendants filed their written statement whereby they disputed the mortgage, and alleged that the property had been given to *Gordhan Harnath* in absolute sale in the year 1813. Issues were settled for trial on the 26th of September, 1864, and documentary and oral evidence at great length was adduced on behalf of the Plaintiff and the Defendants on each side, principally with the view of shewing that the document of title relied on by the opposite party was a forgery. On the 19th of April, 1865, the Moonsiff of *Gogo* made a decree whereby it was ordered that, on payment of Rs.60, the Plaintiff should recover possession of the property in dispute, and that the Defendants should bear the costs of the suit.

On the 18th of January, 1866, the Assistant Judge of *Ahmedabad* reversed the Moonsiff's decision with costs. Subsequently, on the 12th of December, in the same year, the High Court reversed this decree, and remanded the case for a fresh decision.

On remand, by a decree dated the 11th of August, 1869, the district Judge of *Ahmedabad* confirmed the decree of the Moonsiff of *Gogo* with costs.

On the 17th of November, 1869, the Appellant preferred a special appeal from the decision of the district Judge of *Ahmedabad* to the High Court of Judicature, *Bombay*, mainly on the ground that the Judge had no jurisdiction to try the appeal, as the village in which the land was situated had been removed from the jurisdiction of the Civil Courts before the appeal was decided.

On the 2nd of December, 1870, the High Court pronounced a decree confirming the decree of the lower Appellate Court with costs.

The material part of the judgment of the High Court was as follows :—

"The disputed land is situated in the village of *Gangli*, within the pergunnah of *Gogo* (*vide* Act. VI. 1859), and that pergunnah forms part of the zillah of *Ahmedabad* as established by sect. 16, Reg. II. of 1827.

"But it is argued that the village of *Gangli* had been removed from the jurisdiction of the Civil Courts of the *Bombay* Presidency previous to the disposal of the case by the district Judge of *Ahmedabad*, and that, consequently, his decree is illegal.

"This argument is founded on a notification dated the 29th of January, 1866, and published at page 197 of the *Bombay Government Gazette* for that year. It runs as follows :—

"Revenue Department.

"It is hereby notified that, in accordance with a convention made between His Excellency the Governor of *Bombay* and His Highness the Thakoor of *Bhownuggur*, the undermentioned villages belonging to the Thakoor of *Bhownuggur*, and situated in the pergunnahs of *Dhandooka*, *Ranpore*, and *Gogo*, zillah *Ahmedabad*, are from and after the 1st of February, 1866, Sanwat 1922, Mahavud 2nd, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, and transferred to the supervision of the Political Agency in *Kattywar* on the same conditions as to jurisdiction as the villages of the talook of the Thakoor of *Bhownuggur*, heretofore in that province.

"*Sehore* Talooka.

"*Gangli*.

"By Order,
"(Sd.) *F. S. Chapman*,
"Chief Secretary to Government.

"*Bombay Castle*, 29th January, 1866."

"This notification, it may be observed, though signed by the chief secretary to Government, does not state by what authority it was issued, merely 'by order.' Appearing, however, as it does in the *Government Gazette*, and under the signature of the highest ministerial officer under Government, it may be assumed that it was issued by order of His Excellency the Governor in Council; but the notification is defective in a far more material point, for it omits to recite the law which was supposed to confer on the

Governor in Council the power to limit the jurisdiction of the Civil and Criminal Courts of this Presidency.

"It has not been shewn to us that any such law exists, and, on the contrary, we find that at the time this notification was issued sect. 6, Reg. I. of 1827, which provides that 'regulations are to be in force at such places and from such periods as may be declared in a regulation actually in force' was unrepealed; and as the regulation establishing the *Ahmedabad* zillah, of which the village of *Gangli* forms a part, was also unrepealed, it follows that a legal enactment was necessary to effect the object which Government had in view when issuing the notification referred to. It was suggested in the course of the argument that the notification might have been issued under c. 2, sect. 16, Reg. II., 1827; but even admitting that this law gives the Governor in Council power to cede territory, no authority could be assumed to exist in that body summarily to abrogate any law in force in such territory in the face of sect. 6, Reg. I., 1827.

"That this notification is inefficacious is still more apparent when we come to look at the full force it was intended to have, for it purports to affect not only the local Courts, but also the High Court, which, under sect. 1, Reg. II. of 1827, and sect. 9 of 24 & 25 Vict. c. 104, has jurisdiction over all the territories subordinate to the Presidency of *Bombay* in which the code of regulations has operation by enactment. It seems to us, therefore, that the notification referred to is, as far as the argument in this case is concerned, of no effect whatever, and that the village of *Gangli* not having been legally removed from the jurisdiction of the district Court of *Ahmedabad*, the decree of the Judge must be upheld."

On the 31st of January, 1872, the Appellant presented a petition of review in the High Court. The grounds on which the petition was presented, so far as material, were as follows:—

1. That the Court was wrong in considering that the Judge had jurisdiction to decide the case. 2. That the additional evidence which the petitioner had obtained from Government since the decision of the case would shew that the village in question was removed from the jurisdiction of the Civil Courts, and transferred to *Bhownuggur* by the Government of *Bombay*, with the consent and sanction of the Governor-General of *India* in Council and the

Secretary of State, and that the Government had authority to remove it from the jurisdiction of the Civil Courts.

On the 25th of April, 1872, a rule *nisi* was granted on the ground of jurisdiction to shew cause why the decree of the High Court (December 2, 1870) should not be reversed or varied, and on the 16th of December, 1872, the rule was made absolute with costs.

The additional evidence referred to comprised the following documents, which were filed in the Court with the petition of review. The first was a copy letter from the Secretary of the Foreign Department of the Government of *India* to the Acting Secretary of the Government of *Bombay*, dated the 31st of May, 1865, in these terms:—

"I have the honour to acknowledge the receipt of your letter dated the 10th instant, No. 80, forwarding copy of a communication from the Thakoor of *Bhownuggur*, asking for an early settlement of the arrangements entered into with him by Sir *George Clerk*.

"2. The Thakoor's present application is understood to refer to the contemplated transfer of the town of *Bhownuggur*, of the district of *Sehore*, and of the villages in *Dhundooka* and *Gogo*, to the supervision laws and regulations of the *Kattywar* Political Agency.

"3. His Excellency in Council observes that this matter, in common with the general question of the future administration of *Kattywar*, was referred for the final consideration of the *Bombay* Government in my predecessor's letter No. 132, dated the 13th February, 1865. As Her Majesty's Secretary of State for *India* has decided that *Kattywar* is not British territory, the projected transfer will have been legalised by the agreement concluded between Sir *George Clerk* and the Thakoor, which subsequently received the sanction of the Secretary of State, with the reservation that, in the event of gross misconduct on the part of the Thakoor, these territories shall revert.

"4. His Excellency in Council authorizes the contemplated arrangement being at once carried into effect. The Government of *Bombay* will be judges of what shall constitute gross misconduct, and will be careful to append to the original agreement a stipulation embodying the Secretary of State's reservation upon that point."

The second document was a copy resolution of the Revenue Department of the Government of *Bombay*, dated the 28th of January, 1871:—

"Revenue Department,
"*Bombay Castle*, 28th of January, 1871.

"Memorandum from the Oriental translator to Government, No. 1169, dated the 18th of November, 1870: submitting substance of a petition from *Damodhar Gordhan*, praying that he may be ordered to be furnished for production in the High Court, with a copy of letter from the Secretary of State or other authority under which certain villages of the *Gogo*, *Dhundooka*, and *Ranpore* talookas were transferred to *Bhownuggur* with the civil and criminal jurisdiction over them; as the Judges of the High Court have, in a suit filed against petitioner, to recover certain land in one of the transferred villages in which he contended want of jurisdiction, declined to recognise the legality of the transfer, exempting the villages from the jurisdiction of Her Majesty's High Court, on the ground that the *Bombay* Government had no power to remove them from the jurisdiction of the Civil Court without legal authority.

"Memorandum from the Revenue Commissioner N.D. No. 343, dated the 20th of January, 1871; submitting with his remarks, a report by the Acting Collector of *Ahmedabad*."

"Resolution.—Her Majesty's Government, in concurrence with the opinions of the law officers of the Crown, have decided that the Government of *India* has power to cede territory to native states, and 'is the sole judge of the considerations of state policy by which grants of territory must be determined.' The cession of certain villages in the *Gogo*, *Dhundooka*, and *Ranpore* pergunnahs from British territory to the jurisdiction of the Thakoor of *Bhownuggur*, was directed to be made by the Government of *India*. Amongst these is the village of *Gangli*, situated in the pergunnah of *Gogo* of the *Ahmedabad* zillah."

The third document was an extract from the proceedings of the

J. C.
1875-6

DAMODHAR GORDHAN *v.* DEORAM KANJI.

Government of *Bombay* in the Revenue Department, dated the 14th of April, 1870:—

"The Viceroy and Governor-General in Council has considered with much attention the important papers forwarded with the resolution of the *Bombay* Government in the Revenue Department, No. 3, dated the 3rd of January, 1870, and desires me to convey to you the following observations for the information of his Excellency the Governor of *Bombay* in Council.

"2. The Governor-General in Council, as at present advised, is of opinion that a Legislative Act of the Government of *India* is not required to give effect to the arrangements made between the *Bombay* Government and the state of *Edur* and sanctioned by the Secretary of State.

"3. Her Majesty's Government, in concurrence with the opinion of the law officers of the Crown, have decided that the Government of *India* has power to cede territory to native states, and 'is the sole judge of the considerations of state policy by which grants of territory must be determined.' It is a necessary inference from the possession of this power that no Act of any Legislature is necessary to give effect to such a fact. The jurisdiction of British Courts must cease as soon as the territory over which it was exercised ceases to be British territory.

"4. The only question which can possibly arise is whether the Indian Courts would recognise the validity of the arrangement if it ever came before them; and on this point His Excellency in Council does not see how the question of the validity of such a cession of territory could come before the Courts, or in the event of their refusal to recognise it, how any decree which they might issue as to land or property could be executed outside of British territory.

"5. The arrangements with the *Edur* State, however, of which the first intimation received by the Governor-General in Council was in the copy of the dispatch from the *Bombay* Government to the Secretary of State, No. 21, dated the 6th of July, 1869, forwarded to the Home Department with your No. 2784, dated the 8th idem, are such as ought not to have been made without the previous sanction of the Government of *India*. They are in substance a treaty by which each party transfers to the other certain rights and certain portions of territory. But it is provided by 33 Geo. 3, c. 52, s. 43, that the Government of *Bombay* shall not negotiate or conclude any treaty with any Indian Prince or State without the authority of the Governor-General of *India* in Council or of the Court of Directors, for which that of the Secretary of State is now substituted.

"6. The defect arising from the want of previous sanction may be considered as cured by the subsequent sanction which the Secretary of State has extended to the transaction in his revenue despatch to the *Bombay* Government, No. 67, of the 16th of September, 1869. But I am to point out that it would have been more in accordance with the requirements of the law if the proposed arrangements had been previously submitted for the orders of his Excellency the Viceroy and Governor-General in Council, and I am to request that this course may in future be pursued before any such negotiations are entered on with any Indian Prince or any foreign state or power."

On the 1st of September, 1872, the *Indian Evidence Act* came into operation, sect. 113 of which contains the following provision:—"A notification in the *Gazette of India* that any portion of British territory has been ceded to any native state, prince, or ruler shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification."

On the 4th of January, 1873, a notification appeared in the *Gazette of India* in these terms:—"The Governor-General hereby notifies the fact that the villages mentioned in the schedule here below appended were on the 1st of February, 1866, ceded to the State of *Bhownuggur*." Among the villages enumerated in the schedule was *Gangli*.

On the 24th of March, 1873, the High Court at *Bombay* pronounced judgment on the Appellant's petition of review. The material portions of that judgment are as follows:—

"The question of jurisdiction has now been formally argued before us.

"The Appellant's arguments put shortly amount to this: that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for *India* succeeded under the provisions of sect. 3, chap. 106, of 21 & 22 Vict.; that this Court, under sect. 57, sub-sect. 10, of the *Indian Evidence Act*, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette ;* and further that this Court, being bound by the law, cannot but hold the cession to be valid under sect. 113 of the same *Evidence Act*, coupled with a notification in the *Gazette of India*, 4th January, 1873, as follows:—'The Governor-General of *India* in Council hereby notifies the fact that the villages mentioned in the schedule here below appended were, on the 1st of February, 1866, ceded to the State of *Bhownuggur*' (the village of *Gangli* being included in the same schedule).

"Whereas on behalf of the Respondent it was urged with much force and ability that the power to cede territory, and therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and therefore could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone; that, therefore, the cession was invalid, and the recent notification in the *Gazette of India* made for the purposes of sect. 113 of the *Evidence Act* was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament; that the Legislature had no power to make retrospective laws; and, lastly, that even though the question of jurisdiction be decided against the Respondent, the Appellant having already attorned to the jurisdiction cannot now be heard to object.

"With regard to attorning to the jurisdiction, the Respondent's argument appears altogether untenable; it is advisable, therefore, at the outset, to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory, but none of those cases go to the length of shewing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give

J. C.
1875-6
DAMODHAR GORDHAN
v.
DEORAM KANJI.

any Court a jurisdiction not before possessed over the subject-matter in dispute; and it is also manifest that if the legal effect of the cession of territory notified was to remove the village of *Gangli* out of the jurisdiction of the district Court of *Ahmedabad,* sects. 3 and 37, Act. XXIII. of 1861, provided an absolute bar to the Judge's hearing this appeal.

"Two main questions arise in this case; one, as to the effect of the declaration in the *Gazette of India* in January last, that territory has been ceded, and the other as to the validity and legality of the cession itself.

"The power of the Indian Legislature to create such a statutory presumption having been challenged on the ground that it affects the authority of Parliament, we find that the first of these questions involves an inquiry into the very serious one of the Crown's prerogative to cede territory.

"We prefer then first to consider, with regard to the second question, what rights for cession of territory were vested in the *East India Company;* for it is clear that only those powers which the Company possessed 'either alone or by the direction and with the sanction of the Commissioners of the Affairs of *India,'* devolved upon Her Majesty's Secretary of State.

"We know that from the time of their first charter, granted by Queen *Elizabeth* in 1600, down to 1767, the Company were merely recognised as traders, but as their struggles with the French company left them at the peace of 1763 masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a committee to inquire into the nature of the Company's charters, the inquiry resulting in their being continued by 7 Geo. 3, c. 57, s. 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February, 1769, on condition of the payment of a certain annual sum.

"From this date the Company's exclusive trade and government were renewed from time to time, until by 3 & 4 Will. 4, c. 85, their trade was suspended, except in so far as it might be carried on for purposes of government, their term of government being continued until the 30th of April, 1854, and finally this term was renewed 'until Parliament should otherwise provide, until in fact the passing of 21 & 22 Vict. c. 106, which transferred the government of *India* to Her Majesty.

"We see, then, that from the year 1767, when the *East India Company's* territorial acquisitions were first recognised as British territory, they were from time to time continued in possession of them subject to the authority of Parliament.

"It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed were derived from Parliament. All the charters from 1767 expressly entrust the Company with possession and government of the British territories, and appropriation of the revenues (as a necessary means of governing) for the Crown, and the Board of Commissioners was created with 'full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to or concern the civil and military government and revenues of the said territories and acquisitions in the *East Indies*.' And though it may be inferred that the Company and Board had power to levy war or make peace, and to make treaties with native princes and states in *India* for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power under the direction and control of the Board of Commissioners to 'declare and appoint what part or parts of any of the territories under the government of the Company should from time to time be subject to the government of each of the several presidencies then subsisting or to be established, and to alter from time to time the limits of the presidencies and lieutenant-governorships.' If, therefore, special enactments were necessary to enable the government of the country to make internal arrangements and distributions of British territories, *à fortiori* would it appear that without such special enactment they were incompetent to cede any portion of them?

"Mr. *Forsyth* in his Cases and Opinions on Constitutional Law,

p. 185, gives two instances of cession (not under treaty of peace) by the *East India Company* to a foreign state previous to 1858:—

"1. In 1817, a cession by treaty in full sovereignty to the *Sikhumputtee* Rajah of a part of territory formerly possessed by the Rajah of *Nepaul,* but ceded to the *East India Company* by a treaty of peace.

"2. In 1833, a cession by treaty to Rajah *Poorunder Singh* of a portion of *Assam* lying on the south of the *Burrumpooter* river, by which the Rajah bound himself 'in the administration of justice in the country now made over to him to abstain from the practices of former Rajahs of *Assam* as to cutting off ears and noses, extracting eyes, and otherwise mutilating and torturing.'

"Alluding to the latter case Mr. *Forsyth* adds: 'This is not a very satisfactory precedent, and it shews the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous power.'

"And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company's status and powers.

"Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of *India* to Her Majesty, we turn to consider the effect of the *Gazette of India* notification.

"Sect. 113 of the *Evidence Act,* which received the assent of the Governor-General on the 15th of March, 1872, runs thus: 'A notification in the *Gazette of India* that any portion of British territory has been ceded to any native state, prince, or ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification.'

"This section was first introduced in the Amended Bill, presented on the 30th of January, 1872, to the Legislative Council of the Governor-General, with these remarks by the Select Committee: 'A conclusive presumption is a direction by the law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided in sections 112 and 113,' and 'we have provided in the chapter on the Burden of Proof that a notification in the *Gazette* that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.'

"Our judgment in this case was passed on the 2nd of December, 1870, when there existed only the notification of the *Bombay Gazette,* dated the 29th of January, 1866, and we granted the review on the 16th of December, 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession.

"But on the 4th of January, 1873, appeared in the *Gazette of India* the notification that the village of *Gangli,* with several others, had been ceded seven years before; and we are now told that even though the approval by the Secretary of State of the cession be not all sufficient, we cannot consider that question. No doubt this would be the effect of sect. 113, provided that it lay within the power of the Legislative Council to make such a law.

"What, then, are the powers of the Council of the Governor-General? By sect. 43, 3 & 4 Will. 4, c. 85, the Governor-General in Council was empowered to legislate for *India,* except that he 'shall not have the power of making any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament . . . or any part of the unwritten laws or constitution of the *United Kingdom of Great Britain and Ireland,* whereon may depend in any degree the allegiance of any person to the Crown of the *United Kingdom,*' or to the 'sovereignty and dominion of the said Crown over any part of the said territories.'

"This section was repealed by sect. 2, Act 24 & 25 Vict. c. 67, the *Indian Councils' Act,* but by sect. 22 of this Act it was again provided 'that the Governor-General in Council shall not have the power of making any laws or regulations . . . which may affect the authority of Parliament . . . or any part of the unwritten laws or constitution of the *United Kingdom of Great Britain and Ireland,* whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty and dominion of the said Crown over any part of the said territories.' Further on, in sect. 24 of the same Act, we find that 'no law or regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogative of the Crown.'

"It is a notable circumstance that the wording of the repealed section of 3 & 4 Will 4, c. 85, and of sect. 22 of the *Councils' Act* substituted for it, differs only in one particular, *i.e.*, that in the latter the words 'prerogative of the Crown' are omitted, nor is it easy to understand the reason for this omission. Prior to this Act no general power was given to the Crown to disallow laws made by the Legislative Council.

"Sect. 26 of 16 & 17 Vict. c. 95, declared that 'no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown, signified in a prescribed form,' and the *Councils' Act* which repealed this made express provision for the transmission to the Secretary of State for *India* of copies of all laws and regulations assented to by the Governor-General, and for their disallowance by Her Majesty.

"In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that before the passing of the *Councils' Act* the Crown had previously sanctioned it, or that, after that period, it had not been disallowed.

"But the law expressly prohibiting the Legislative Council of *India* from making any law affecting the authority of Parliament is in no way varied or altered by the *Indian Councils' Act.*

"The value, therefore, of sect. 113 of the *Evidence Act* depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its powers, and that sect. 113 was and must continue to be bad law.

"On this point we have been referred to the opinions of *Grotius*, *Vattel*, *Puffendorf*, *Chalmers*, *Wheaton*, *Phillimore*, and *Twiss*, who all appear to support the proposition that no power resides in the

Crown to cede territory save under circumstances of necessity. Most of these writers are referred to by Mr. *Forsyth* in the work to which we have alluded above, and the conclusion at which he appears to arrive is, that while the Crown can by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. *Vattel, Puffendorf,* and *Grotius* may or may not be accepted as authorities, but Mr. *Forsyth* strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative. The case of the *Orange River* territory, and the sale of *Dunkirk*, by *Charles* II., and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the *Orange River* territory, we have been unable to consult the correspondence to which reference is advised, but as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which it had enacted by its letters patent without reference to Parliament. The cases, moreover, are not analogous, for the British territories in *India* have been the subject of parliamentary legislation from the time of their acquisition, and have become thereby a material part of the property, and, therefore, of the body, of the State. It appears to be considered by some, *vide* Lord *Palmerston's* speech in the debate on the Relinquishment by the British Crown of the Protectorate of the *Ionian Islands,* that a distinction exists between cessions of British freehold and of territory acquired by conquest during war, and not by treaty, or ceded by treaty and held as possessions of the British Crown, but the cases he quoted were all, observed Mr. *Forsyth,* cessions at the close of a war. On what principle can such a distinction rest?

"All subjects of the Crown possess the same rights, and incur the same obligations. Allegiance by the English law is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

"That Her Majesty's subjects in *India* have the same rights with all her other subjects is clear from the Queen's proclamation of 1858; the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

" *Vattel's* arguments on the principles involved commend themselves to our reason. In his Book I., ch. 21, sect. 263, he says: 'A nation ought to preserve itself, it ought to preserve all its members, it cannot abandon them, and it is under an engagement to support them in their ranks as members of the nation. It has not, then, a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it. They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body if the public safety requires.' In considering further whether the Prince has power to dismember the State, he says that 'this depends on whether he has received full and absolute authority from the nation,' and proceeds: 'The nation ought never to abandon its members but in a case of necessity, or with a view to the public safety, and to preserve itself from total ruin, and the Prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the state requires.'

" We have no knowledge of the reasons which induced the transfer of *Gangli* and other villages to the State of *Bhownuggur*, but it is certain that there existed no such necessity as is recognised by the publicists.

" If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.

"Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of *Great Britain* and *Ireland* whereon depends the allegiance of persons to the Crown of the *United Kingdom.*

"This being so, sect. 113 of the *Indian Evidence Act,* though not disallowed, is not protected by sect. 24 of 24 & 25 Vict. c. 67, and we cannot, therefore, follow its directions. For these reasons we decline to alter our decision, which will therefore stand."

In pursuance of special leave duly granted by the High Court the Appellant appealed to Her Majesty in Council against the last-mentioned decree.

Sir *W. V. Harcourt,* Q.C., *Fitzjames Stephen,* Q.C., and *E. Macnaghten,* for the Appellant.

Forsyth, Q.C., and *Bell,* for the Respondent.

Sir *W. V. Harcourt,* Q.C.:—The Government of *India,* as representing the Crown, has power to cede territory to native states, princes, and rulers, and is the sole judge of the considerations of state policy by which such grants of territory must be determined. It is not now argued that the right of the Crown so to cede territory is a derivative right under 21 & 22 Vict. c. 106, s. 3. The two main questions dealt with in the judgment of the High Court are:—(*a*) as to effect of the notification in the *Indian Gazette* of January, 1873, that territory had been ceded; (*b*) as to the validity and legality of the cession so notified. As respects (*a*) the Court was bound under sect. 57, sub-s. (10), of the *Indian Evidence Act* to accept the territorial alterations notified in the *Gazette.* The notification of 1866, coupled with a subsequent one dated the 4th of January, 1873, made under sect. 113 of the *Indian Evidence Act,* 1872, settles the fact of cession, though it is unnecessary to argue that it also establishes the right to cede. As respects (*b*) it is distinctly disputed that, as stated by the judgment, only those powers which the Company possessed, either alone, or by the direction and with the sanction of the Commissioners of the Affairs of *India*, devolved upon Her Majesty's Secretary of State. No doubt that is stated to have been the argument of the Appellant in the Court below; but nothing can be more inaccurate than to say, as is stated further on in the same judgment, that 21 & 22 Vict. c. 106, transferred the Government of *India* to Her Majesty. The notion which pervades the whole of the judgment of the High Court is, that the prerogative of the Crown and the power of the Secretary of State are derived from various Acts of Parliament, and have no existence except so far as they are created and defined by such Acts. It also declares that the *East India Company* and Board of Control, although they could make peace and war, and conclude treaties, had no power to dismember existing British territories, and that two isolated cases of cession cited by Mr. *Forsyth* in his Cases and Opinions on Constitutional Law, cannot establish the existence of a prerogative not evidenced by the various Acts which defined the Company's status and powers. But as a matter of fact the *East India Company* from first to last exercised the power of ceding territories; and the Respondents throughout their litigation have failed to shew any case in which parliamentary authority was invoked to validate any cession. So far as the evidence of the fact of cession is concerned, the notification of 1873, under the *Indian Evidence Act,* 1872, sect. 113, is important. It denotes agreement on the part of the Indian Legislature to a particular cession, so far as such agreement can avail; but the question now argued relates to the necessity of the assent of the Imperial Legislature in order to validate a cession made by the authority of the Crown. For no doubt, whether under 3 & 4 Will. 4, c. 85, or under 24 & 25 Vict. c. 67, it was and is beyond the power of the Legislative Council of *India* to make any law which limits the authority of the Imperial Parliament.

It is argued for the Appellant, that the Governor General in Council in this case exercised the prerogative of the Crown as Viceroy by delegation. The statutes referred to by the High Court affect the legislative and not the executive power of the Indian Government; and the *Indian Evidence Act* of 1872 is relied upon, not as conferring a statutory authority upon the Government to cede territory, but as providing statutory evidence of cession already made in the exercise of prerogative existing antecedently to that Act. [LORD SELBORNE:—Of course, if the Crown has no power to cede territory without the consent of Parliament, or except under circumstances of necessity, no Act of the Legislative Council of *India* could create such a power.] The Legislative Council in *India* is very much like the Queen in Council in respect of its powers and functions. An order by either of them which violated an Act of Parliament, or, indeed, violated the principles upon which parliamentary government is founded, would be *ipso facto* void. [SIR JAMES W. COLVILE:—The Governor General in Council can repeal an Act of Parliament passed before the *Indian Councils Act.*] Yes; but under parliamentary authority. The judgment of the High Court proceeds (*a*) On the assumption that the title of the Crown to its Indian possessions is a derivative title from the *East India Company*, or, at least, a title conferred by Act of Parliament (21 & 22 Vict. c. 106), which is treated as a Transfer Act; (*b*) That the power to cede territory, not being evidenced by any of the Acts of Parliament relating to the Company, was not one of the powers to which the Secretary of State succeeded under the Transfer Act. [THE LORD CHANCELLOR referred to *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (1), where it was put in exactly the opposite way—that the powers of the Company were delegated from the Crown. *Forsyth*, Q.C., admitted that the prerogative of the Crown to cede territory, so far as it existed, was not derived from or to be sought for in any of the Acts of Parliament relating to *India*. Whatever cession was made in this case was not made by the Crown, but by officers of state under authority defined by Act of Parliament.] It will be inconvenient to decide this case on side issues. The broad issue is whether the Crown can cede territory without Parliament. As to (*a*), the title of the Crown as sovereign in *India* is a paramount title, not in any sense derivative. It did not come from the Company, and has nothing to do with the Act of 1858. It rests on the broad ground that if a subject acquires territory, he acquires it for the sovereign, and not for himself. As the Company acquired land and by insensible degrees ceased to be a purely commercial corporation, the

(1) 7 Moo. Ind. Ap. Ca. 476.

sovereignty of the Crown over land so acquired immediately accrued. The Queen was the paramount sovereign of *India* long before she was so declared by the Act of 1858, which simply determined the trust administration of the Company, and did not create any title in the Crown which the Crown did not previously possess. No doubt Parliament might have specially limited the prerogative of the Crown; but save so far as such limitation is expressed, the prerogative remains untouched. The Crown is, and always was, the paramount authority over *India* from the time when Indian territory was first acquired by British subjects; and it is in vain to look to the powers originally exercised by the Company in order to find any limitations to the authority of the Crown, which limitations can only be imposed by Parliament. Yet the *East India Company*, as a matter of fact, from time to time exercised the right of ceding territory. The right of cession resides in the sovereign power, and the question is, where in any particular state does the sovereign power reside? The sovereign power in different states is variously distributed. In *America*, for instance, for purposes of treaty, it resides jointly in the President and in the Senate; the exact opposite is the case in *England*. As a general proposition, where the treaty-making power resides, there also resides the power of cession. [LORD SELBORNE:—Do you contend that the Queen could in time of peace cede a portion of *Great Britain?*] It is unnecessary to my argument to contend that. [THE LORD CHANCELLOR:—Speaking of treaties, they are sometimes made subject to the approval of Parliament.] There are certain treaties and stipulations which cannot be carried out without the assent and co-operation of Parliament, and in those cases the treaty is presented to Parliament, and incorporated with the Act which gives effect to it,—for instance, money and extradition treaties, and matters which involve expenditure. Cession of territory, however, does not require the co-operation of Parliament. [THE LORD CHANCELLOR:—Must there not be a distinction in that respect between territories of the Crown in the government of which a local representative Legislature participates, and those which are governed without such aid?] This is not the case of a constitutional colony, and therefore the distinction need not now be insisted on. [SIR BARNES PEACOCK referred to the notification, and pointed out that it involved a transfer of jurisdiction, not a cession of territory.] It is agreed on both sides that there has been a *de facto* cession. [*Forsyth*, Q.C.:—That is so. LORD SELBORNE :—If Sir *Barnes Peacock* is right, we cannot decide upon what in that case would be an imaginary state of facts.] It is agreed on both sides not to raise that point; and under the *Evidence Act* there is evidence of a *de facto* cession. [LORD SELBORNE :—The real question is, whether there was a transfer of the village of *Gangli* from British to foreign territory?] The Court below decided that point, and neither side in appeal disputes it. [SIR BARNES PEACOCK :—But if *Gangli* nevertheless remains part of British territory, this Court, under the *Evidence Act*, must take judicial notice thereof.] It is a fundamental fact in this case that *Bhownuggur* was foreign territory. [THE LORD CHANCELLOR :—The Judges and the Government seem to have been satisfied on that point.]

There is no use in citing, as the High Court has done, the opinions of *Grotius, Vattel, Puffendorf*, &c., on a question of this constitutional and not international nature. International law does not apply as between a municipal court and the sovereign of the country in which the Court is established. See the debate in the House of Lords, especially the speech of Lord *Thurlow*, on the cessions made at the peace of 1783: Parliamentary History, vol. xxii., pp. 430–1, and *Forsyth's* Cases and Opinions, p. 183.

If it is admitted that the Crown can cede territory under circumstances of pressure, why not also under circumstances of convenience and policy, say for rectification of boundaries? Boundary treaties and references to arbitration all involve the right of cession. He referred to the Articles of the Treaty with the *Netherlands* relating to the cession of the island of *Banca*, in British and Foreign State Papers, vol. ii., p. 370, which involved an exchange of subjects and of territories; to a royal warrant erecting the *Bay Islands* into a British colony, in 1852; see British and Foreign State Papers, vol. xli. p. 156; [LORD SELBORNE :—These were Crown colonies of the simplest character;] to a Treaty with *Honduras* in 1859–60: see British and Foreign State Papers, vol. xlix. p. 13; a Treaty with the *Netherlands* for an interchange of territory on the *Gold Coast* of *Africa*, in 1867: see *Hertslet's* Commercial Treaties, vol. xii. p. 1194. See also the order of the 30th of January, 1854, abandoning the territory of the *Orange River*, which had been erected into British territory by letters patent dated the 21st of March, 1851: see correspondence on the state of the Orange River Territory, presented to Parliament, April 10, 1854; and *Forsyth's* Cases and Opinions, p. 185. There is no instance of parliamentary assent being required to cession by the Crown of its territory. In *India* the Crown has paramount authority over states more or less independent, but not absolutely independent, in virtue of which it recently deposed the Guikowar of *Baroda*. And if the Government, responsible for the administration of such states, were not at liberty to readjust boundaries according to its views of policy and expediency, such limitation of their authority would be extremely inconvenient.

A long catena of instances in which the power of cession and of exchanging territories has been exercised by the Government of *India* is found in *Aitchison's* Treaties, and will be more particularly referred to by Mr. *Stephen*. Their general character is, that they are not cessions under any stress of necessity. They are grants by the sovereign power to its great feudatories in the manner which was common in the earlier history of *England*. They were often rewards for great services, and were so granted.

It can hardly be contended that all the cessions and exchanges there enumerated and set forth were illegal unless or until they were severally confirmed by Parliament. The contention on the other side to that effect is against all authority and all principle. The cession in this case was an act of state, and its validity cannot be called in question in one of Her Majesty's own Courts. The cession and consequent removal of the village of *Gangli* out of the jurisdiction of the District Court of *Ahmedabad* operated as an absolute bar to the hearing of the appeal on remand by the Judge of that Court, and on the hearing of the petition of review the High Court ought so to have declared and determined.

Fitzjames Stephen, Q.C., on the same side:—The judgment of the High Court, in substance, decided (*a*) that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of *India* to Her Majesty; (*b*) that the Crown has no power without the sanction of Parliament to cede territory except in cases of necessity; and that, in reference to the *Bhownuggur* cession, "there existed no such necessity as is recognised by the publicists;" (*c*) that sect. 113 of the *Indian Evidence Act*, though not disallowed, is not protected by sect. 24 of 24 & 25 Vict. c. 67, and the Court, therefore, could not follow its directions. In reference to (*a*), it has already been shewn, and need not be further argued, that the sovereignty of the British Crown over its Indian territories was in no respect derived from the *East India Company*, but that the powers originally exercised by the Company were themselves derived from and exercised in trust for the Crown. In regard to (*c*), he repudiated the construction put by the High Court upon sect. 113 of the *Indian Evidence Act*, to the effect that it purported to give to the Government a power of cession which it did not before possess. The section assumes that a valid cession of British territory to a native state is a legal possibility; and if that is an incorrect assumption the section has no force or operation whatever. Its intent was and is to cut short all questions as to the fact of a particular cession having been made, whether by the Crown or by the Secretary of State, under parliamentary powers sufficient or insufficient; and to prescribe the mode in which a valid cession once made should be proved in a Court of Justice.

As to (*b*), the *Bhownuggur* cession was, according to the law of *England*, valid without an Act of Parliament. He referred to *Blackstone's* statement of the prerogative of making treaties (*Stephen's* Commentaries [7th ed.] vol. ii. p. 490). The treaties which it is the prerogative of the Crown to conclude may be divided, for the purposes of this argument, into three classes, namely, those made at the end of war, those made during time of peace, but not in *India*, and those made in *India*. With regard to those made at the end of war, it is admitted in the Respondent's case, and is clear, that the Crown has the power thereby to cede territory to a foreign power. The power is said to rest on the ground of necessity, but there is no reason why the Crown should be the judge of necessity at the end of war and the legislative body should be the judge thereof in time of peace. There is no ground for such distinction; for if it be said that the powers of the executive are enlarged by the urgency of the case in time of war, it will be found that in nearly every instance of the conclusion of a treaty of peace there was ample time to consult Parliament if Parliament had a right to be consulted. This country has been more in the habit of receiving than of making cessions; but from the treaty of *Breda*, in 1667, downwards, except the treaty of *Utrecht*, there were always restorations or cessions without consent of Parliament. He referred to the *Paix de Bréda*, in 1667 (*Koch* and *Schæll*, *Histoire des Traités de Paix*, vol. ii. pp. 131); to the treaty of *Ryswick*, in 1697 (*Dumont's Corps Diplomatique*, vol. vii. part 2, p. 400); to the treaty of *Aix-la-Chapelle*, in 1748 (*Koch* and *Schæll*, *Histoire des Traités de Paix*, vol. i. pp. 314, 315); to the treaty of *Paris* in 1763, in which a considerable number of cessions were made to the French and Spaniards; to the treaty of *Versailles* in 1783, when the island of *Minorca* and *Florida* were given up to *Spain*, and other cessions made to *France*. In this last-mentioned year was the treaty whereby the independence of *America* was recognised. Parliament gave authority in that case to treat, because intercourse with the persons to be treated with had been forbidden by Act of Parliament. The right to cede territory was not given, for it followed as a matter of course. See 18 Geo. 3, c. 13, and 22 Geo. 3, c. 46; which latter Act expired before the definitive treaty was concluded. Then, again, in this century war was declared by *Sweden* against *Great Britain* in 1810; peace was made on the 18th of July, 1812. In March, 1813, followed the treaty at *Stockholm*, whereby *Sweden* combined with *England* and *Russia* against *France*, and *Guadaloupe* was ceded to her eight months after the peace: see *Hertslet's* Commercial Treaties, vol. ii. pp. 337, 340; *Koch* and *Schæll*, *Histoire des Traités de Paix*, vol. iii. p. 267. In 1814, it was ceded by *Sweden* to *France*.

As regards cessions in time of peace, it is suggested that if these were legal the Crown might cede any portion of territory, say the *Isle of Wight*, to a foreign power. The suggestion must be taken to imply that an adequate reason exists. [LORD SELBORNE:—Then it comes to a question of confidence in the Crown.] The possible extreme abuse of a power is no argument against its existence; you get beyond the tacit terms of a principle when you assume its capricious application. The suggestion must rank beside the historical question, could King *John* legally become a vassal of the Pope? and the answer is, in either case, that to do so from caprice breaks up the political fabric, and presupposes the absence of all law. On the other hand, if *Charles* II., had capriciously ceded the *Isle of Wight* to *Louis* XIV., and he had taken it and kept it, would the Court of King's Bench have held the inhabitants British subjects? Arguments from illustration must be sought in less extreme cases. If, however, illustrations from extreme cases are to be relied upon, it would be possible to suggest abuses of power by Parliament as serious as any which could be committed by the Crown. What, for instance, could be said as to the legality of an Act of Parliament making the House of Commons a permanent body, and enabling it to fill up vacancies by its own votes? The cession of *Dunkirk*, for an account of which see *Dumont's Records Diplomatiques*, vol. vi. part ii. p. 432, illustrates actually what has been done. There a conquered town was sold to *Louis* XIV., and the sale was held to be valid, although the minister who advised it was impeached. Its validity was never questioned in the Courts. He referred to the impeachment of Lord *Clarendon* (State Trials, vol. vi. p. 338). Again, in 1683, *Tangiers* was abandoned in time of peace, and in 1814, by a treaty between *Holland* and *Great Britain*, all conquests were restored to the *Netherlands*. See the second article of the treaty. He also referred to Encyclopædia Britannica, heading, "Mosquito Shore;" *Hertslet's* Commercial Treaties, vol. xi. p. 447; and to the cession to *Greece* of the protectorate over the *Ionian Islands* in 1863.

As regards the cessions which have taken place in *India* during time of peace, Mr. *Forsyth* has in his work implied that they were illegal unless 21 & 22 Vict. c. 106, s. 67, confirmed them. That is a most erroneous construction to put on the section, and so far from there having been only two cases of cession before the mutiny, there were at least twenty-three. He referred to the *Charter Act* of 1793, *i.e.*, 33 Geo. 3, c. 52, ss. 42, 43. After the mutiny of 1857 and the proclamation of 1858, cessions of the greatest importance have taken place, and it would be a most serious thing to say that they were all illegal because they had not been sanctioned by Parliament. Cessions and exchanges have been made without that sanction from time to time during our rule in *India*.

He referred to the following instances of cession of British territory in time of peace made by the Governor-General in Council, and recognised as valid, though without the previous assent or subsequent confirmation of Parliament. In 1782 the Governor General and Council, on behalf of the Honourable Company, granted to *Scindia* the town and pergunnah of *Broach*, in recognition of *Scindia's* services in effecting the peace of *Salbye* with the *Mahrattas* (*Aitchison's* Treaties, vol. iv. p. 214, No. 62). *Broach* had been originally ceded to the British Government by the *Mahrattas* in 1776 (*Aitchison's* Treaties, vol. iii. p. 34, No. 6), which cession was confirmed in 1782 (Ibid. vol. iii. p. 49, No. 9), and was subsequently returned to the British Government in 1803 (Ibid. vol. iv. p. 221, No. 64). In 1792, after the treaty of *Seringapatam*, by which *Tippoo Sultan* was stripped of half his territories, and the subsequent division of such territories between the British Government, the Nizam, and Peishwa, the *Tippoo Sultan* and the Company agreed to exchange certain territories, and concluded a treaty to that effect (Ibid. vol. v. p. 147, No. 27). The Company also ceded a portion of such territorities in 1795 to the Rajah of *Travancore* (Ibid. vol. v. p. 303, No. 53). Again, after the fall of *Seringapatam* in 1799, the Nizam received, by the partition treaty of *Mysore*, certain districts in *Gooty;* and Art. 8 of that treaty clearly assumed the power to exchange territories with the Rajah of *Mysore* (Ibid. vol. v. p. 55, No. 9). A treaty was subsequently concluded with the Rajah of *Mysore* in 1799 (Ibid. vol. v. p. 158, No. 28), Art. 15 of which provided for the adjustment of the lines of frontier of the contracting parties by means of exchange or otherwise, which exchange was subsequently effected in 1803 (Ibid. vol. v. p. 165, No. 29). Again, in 1805, an exchange of territories was effected by the company with the Maha Rao of *Ulwar* for mutual convenience (Ibid. vol. iv. p. 143, No. 39). The Government of *Madras*, about the same date, ceded to *Tondiman*, the chief of the *Poodoocottah* State, the fort and district of *Keelanelly* (Ibid. vol. v. p. 331, No. 59), which cession was subsequently confirmed by the Court of Directors on condition that the district should not be alienated, and that it should revert to the British Government in certain events specified. In 1806 the territory of *Sumbhulpore* and *Patna*, of which the Rajah of *Nagpore* had been stripped in 1803 by the treaty of *Deogaum*, was restored to the Rajah gratuitously, the British Government renouncing all future claim thereto, "and the Maharajah shall possess the same degree of sovereignty over them as he possesses over the rest of his dominions" (Ibid. vol. iii. p. 99, No. 19). Certain territories and rights in *Bundelcund* were ceded to *Govind Rao*, the chief of *Jalaon*, in 1806 (Ibid. vol. iii. p. 150, No. 30). In 1807, in *Khuddea*, a native state was voluntarily created out of territories which had been for three years in British possession (Ibid. vol. iii. p. 187). An exchange of territory was effected by the British Government with the Nawab of *Oudh* in 1816 (Ibid. vol. ii. p. 164, No. 39); with the Guikowar of *Baroda* in 1817 (Ibid. vol. vi. p. 332, No. 74); with *Scindia* in 1818 (Ibid. vol. iv. p. 253, No. 68); with the Nizam in 1822 (Ibid. vol. vi. p. 92, No. 14); with the Chief of *Colaba* in 1822 (Ibid. vol. vi. p. 183, No. 43); with the Rajah of *Cherra Poonjee* in 1829 (Ibid. vol. i. p. 89, No. 18); and with the Rajah of *Satara* (Ibid. vol. iii. p. 20, No. 3); with *Punt Sucheo*, one of the eight hereditary ministers of the old *Mahratta* empire (Ibid. vol. vi. p. 43, No. 8). Then as regards cessions, the British Government ceded, in 1820, to Rajah *Goodursen*, Shah of *Gurhwal*, a portion of his hereditary possessions, of which he had been deprived (Ibid. vol. ii. p. 59, No. 16); in 1822 the district of *Anjar* to the Government of *Cutch* (Ibid. vol. vi. p. 444, c. 14); in 1831 a portion of *Assam* to the Rajah *Poorunder Singh* (Ibid. vol. i. p. 132, No. 46); in 1833 certain territory in the *Kearda Doon* to the Rajah of *Nahun* (Ibid. vol. ii. p. 325, No. 89); in 1846, the fort of *Malwan* and six villages to the Rajah of *Nalagurh* (Ibid. vol. ii. p. 333, No. 94); in 1856, the fort of *Sindwa* to *Holkar* (Ibid. vol. iv. p. 294, No. 75). For cases of cession, 1857–68, see a *précis* thereof in *Wheeler's* Memorandum of Proceedings, August, 1868, Political, A. No. 317. In addition to those cases, the British Government ceded in full sovereignty to *Nepaul* all the lands in the north of *Oudh*, which he had lost in 1815, and we had ceded to *Oudh*, and which became ours on the annexation of *Oudh* in 1856 (Ibid. vol. ii. p. 223, No. 55). Two important cases of exchange were, first in 1824, by treaty between the British Government and the King of the *Netherlands* (Ibid. vol. i. p. 231, No. 84), whereby the latter ceded to the former all his establishments on the continent of *India* (see Art. 8 of that treaty), and the town and fort of *Malacca* and its dependencies (Art. 10); and, on the other hand, *Fort Marlborough* (*Bencoolen*), and all the English possessions in the Island of *Sumatra* were ceded to the *Netherlands*. This was a case of cession by the Crown in which the power of the Crown to make such cession was tacitly admitted by Parliament, for 5 Geo. 4, c. 108 (see also 6 Geo. 4, c. 85), legalised the transfer of *Singapore* and the possessions ceded, by the Dutch, by the Crown to the *East India Company*; and although the above treaty was recited, the Act did not confirm it, but recognised its validity in the exercise of the royal prerogative alone. The case is a strong one, for *Bencoolen*, part of the territory ceded, was one of the oldest possessions of the Crown, and originally a presidency named in several Acts of Parliament (see especially 13 Geo. 3, c. 63, ss. 9, 40; 42 Geo. 3, c. 29). The second was a treaty concluded with *Scindia* on the 2nd of December, 1871, whereby the British Government ceded to *Scindia*, in exchange for territories ceded by him, certain villages situated in the pergunnahs of *Mote* and *Bhandere* in *Jhansi*.

Finally, as to the cession in this case; in 1815, owing to a serious abuse of power, the Rawul of *Bhownuggur's* British estates were brought under the jurisdiction of the British Courts of the *Bombay* Presidency, and the revenue payable by him was raised. The anomaly of the position was, that in his *Kattywar* estates he continued to exercise his former powers, paying a fixed revenue, while in his British estates, including his two largest towns and his place of residence, he was subject to ordinary British laws. The Rawul never ceased to complain of this, and to bring forward many claims against the British Government, which led to the agreement of the 23rd of October, 1860, by which the Thakoor's revenue was fixed at Rs.52,000 in perpetuity, and his other claims were adjusted.

Suppose all the grants just enumerated to be invalid great inconvenience would result; the greatest publicity was given to them, many of them were made in open *durbar;* they were made by the supreme executive authority, and the principle *fieri non debet factum valet* at least must avail in their behalf.

As regards international law, its doctrines are often mere matter of moral speculation, which it is an abuse of terms to call law. Any treaty, however, which according to the usage of nations is regarded as valid, ought to be so regarded by Courts of Justice. He referred to *Grotius*, bk. ii. ch. 6, ss. 3, 4, and 6; *Phillimore's* International Law, vol. i. pp. 309, 310; also p. 313, s. 266. The English nation, Crown and Parliament, having stood by whilst numerous cessions were made after the mutiny, it is too late now to question their validity. These were acts of state done by the sovereign power with regard to other powers invested with a greater or less degree of independence, and now to deny their validity would be a breach of faith. He referred to *Kent's* Commentaries [12th ed.] vol. i. p. 285; *Wheaton's* International Law, Part iii. c. 2. Applying the principles there stated, suppose *Scindia* or *Nepaul* was arguing for the validity of a cession to him, he would say: I received it from the Governor General in Council directly authorized by Her Majesty; there were thirty or forty cases and no question was raised; the treaty-making power of the Governor General in Council has been recognised by Parliament, under which the English have acquired vast territories, and the Crown itself has ceded territories in *Europe* without any interference by Parliament. As to the state of things in the *United States*, there is a wide difference between a country with a written constitution and one without. [SIR BARNES PEACOCK:—Is not 21 & 22 Vict. c. 106, itself a written constitution?] No, certainly not; the sovereign power of the Crown over *India* does not depend on that Act. He referred to the *Tanjore Case* (1), and contended that an act of state when complete must be recognised as valid by the Courts of the country. The constitution of this country has been settled piecemeal as questions have from time to time arisen. The executive government is the prerogative of the King, but a control by Parliament is recognised. This principle applies to cessions of territory as well as to every act which the Government has to do. Such

(1) 7 Moore's Ind. Ap. Ca. 529.

J. C.
1875-6
Damodhar Gordhan
v.
Deoram Kanji.

act when once done, if within the sphere at all of the executive government, must be deemed valid if unquestioned. [Sir Barnes Peacock:—Could the Governor General in Council with consent of the Secretary of State aliene *Bengal* and all its revenues to the King of *Delhi?*] Yes, subject to responsibility for so doing. It would be indecent to suppose a wanton cession. The power to declare a disastrous war exists and is recognised by law, and is far worse than the power to cede territory. The power to cede belongs to the sovereign power, its exercise may be controlled beforehand, and the onus is on the other side to shew that the power has been curtailed. [Sir Barnes Peacock:—By the *Indian Evidence Act* the Court must take judicial notice of what are the British territories in *India.* Is it precluded from doing so by a proclamation of the Governor General in Council? Lord Selborne:—If the Court must take judicial notice of the existing territories, it must take judicial notice of a cession. The Lord Chancellor:—There has been, by general consent, a *de facto* cession, the question is whether there has been a *de ure* cession.] The High Court say: "We have no knowledge of the reasons which induced the transfer of *Gangli* and other villages to the state of *Bhownuggur*, but it is certain that there existed no such necessity as is recognised by the publicists." If necessity is the test of a *de jure* cession, the sovereign must be the sole judge of the necessity.

Finally, as regards the alleged indefeasibility of allegiance, according to the law of *England*, as laid down in *Calvin's Case* (1), allegiance to the sovereign attaches on the birth of the subject, and is a personal relation, not dependent upon either residence or territory. See *Hale's* Pleas of the Crown, vol. i. p. 68. [Lord Selborne:—Though a citizen cannot determine his own allegiance, some authority in the State perchance may do so.] The Crown, under certain circumstances, may absolve the subject from allegiance; there is no warrant for the notion of the High Court that allegiance results from a sort of matrimonial contract between sovereign and subjects which no power can divorce.

Mr. *Forsyth*, Q.C., for the Respondents:—The question is, whether a British subject, having prosecuted his suit in a British

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(1) Co. Rep. pt. vii. p. 1.

Court in British territories, established by regulations which are themselves authorized by Act of Parliament, can be stopped in his suit and deprived of the fruits of his decree by an act of the state, which I admit to be an act of the Crown. The distinction as regards the power of the Crown to dismember the empire lies between the power of the Crown in certain emergencies to cede territories (*e.g.* conquered territories, which are subsequently restored to an enemy) which have never been the subject of parliamentary legislation, and the power to deal with territories of the Crown which have been the subject of Acts of Parliament, and to the inhabitants of which Parliament has given rights not conferrable by the Crown. Unless this distinction is preserved, the prerogative of the Crown must be held to include the power of repealing Acts of Parliament. *Gangli* was in the position of being part of a territory, to the inhabitants of which Parliament had given certain rights. It was acquired under the Treaty of *Assam* in 1802. The *Regulating Act* (13 Geo. 3, c. 63, s. 36) gave power to the Governor-General in Council to pass regulations in *Bengal*, and in 1807, 47 Geo. 3, c. 68, was passed, which applies to the Presidency of *Bombay*. Sect. 1 conferred legislative power on the subordinate Presidency. See the first three sections; and see also 3 & 4 Will. 4. c. 85. [LORD SELBORNE:—Assuming the power of the Crown to cede existed before that Act, is there anything in the Act to interfere with it? Sir *W. Harcourt* referred to sect. 9 of the *Regulating Act; Bencoolen*, which was afterwards ceded, being *in pari materiâ* with *Madras* and *Bombay.*] See *Bombay* Regulation of 1827, Reg. I., s. 6, and Reg. II., s. 16, and Appendix E. When Parliament has settled the constitution and government of a territory and erected Courts of Justice therein, the prerogative of the Crown does not exist to take away rights so conferred and give the territory to a foreign power. [THE LORD CHANCELLOR:—If Parliament were by Act this year to set up Courts in *Fiji*, you say that such Act would take away the power of cession from the Crown which existed previously.] Yes, the former prerogative of the Crown, if it existed, would thereby be limited. [THE LORD CHANCELLOR:—Do you admit that where Parliament has not interfered the Crown would have power to cede?] I admit thus far, that at the conclusion of war the Crown may cede territory, to ensure peace, if it has never been the subject of parliamentary legislation; but otherwise the Crown has no such power. [THE LORD CHANCELLOR:—Have you any authority for that proposition? As I read *Vattel*, as cited by the Court below, he considers that the Crown has that power.] There is no authority in any English text writer to the effect that the Crown has an unlimited power of cession; the other side have cited none. But even if such power exists a strong distinction is obvious between territory which has been subject to parliamentary legislation and territory which has not been and is not so subject; and the alleged right of the Crown to cede the former involves the right of the Crown to interfere with Parliament. [LORD SELBORNE:—If the antecedent power of the Crown is admitted, the Act of Parliament in the particular instance must be shewn to have taken it away.] As regards such antecedent authority, we must look at what the Crown has done, and it is contended that it has no power to cede territory in time of peace. [THE LORD CHANCELLOR:—Surely there is *plenum dominium* unless you shew a limitation. LORD SELBORNE:—If the Crown may accept the duties of sovereignty, as in the case of *Fiji*, it lies on you to shew that it may not give them up. THE LORD CHANCELLOR:—Have you any authority of any institutional writer commanding respect that the Crown has not that power?] See *Wheaton's* International Law [*Dana's* 8th ed.], sect. 541, part 4, chap. 4, "Dismemberment of States by Treaty;" a passage which deals with a power of ceding territory by a treaty of peace following the close of a war, and which will therefore apply *à fortiori* as to the power in time of profound peace, when there is no war. It is to the effect that the treaty-making power in respect of dismemberment is, under most free governments, limited either by express prohibition or necessary implication from the nature of the constitution. Under the constitution of the old French monarchy, the States-General declared that *Francis* I. had no such power, but *Louis* XIV. asserted that power after the disuse of the States-General, and ceded territory as the price of peace. This power was also limited by the French constitution established after 1789. The next section states: "In *Great Britain* the treaty-making power as a branch of the regal prerogative has in theory no limits, but it is practically limited by the general controlling authority of Parliament, whose approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the empire are altered." [THE LORD CHANCELLOR:—That opinion seems to be rather against you; when the co-operation of Parliament is required, no doubt its assent is necessary.] See also *Puffendorf*, book viii. c. 5, s. 9: "The Power of Sovereign over the Estates of his Subjects;" who denies the authority of a prince to transfer his kingdom or his subjects, and says, that the consent of the people is necessary. In respect of a partial alienation of territory, the consent both of the inhabitants of the parts retained and of the portion alienated, is equally required. And when *Savoy* and *Nice* were ceded by the King of *Sardinia* to the Emperor of the French at the close of the Austro-Italian war, there was what was called a *plébiscite*, and the people were ostensibly asked to consent to the cession. [LORD SELBORNE:—Then, whatever Parliament might say, the inhabitants of *Bhownuggur* must also be consulted. THE LORD CHANCELLOR:—The gist of the authorities is, that if the inhabitants of the territory cut adrift are physically strong enough, they are morally justified under such circumstances in asserting their independence.] Though an absolute prince may cede, a constitutional monarch cannot of his own will withdraw his government and protection. *Richard* II., for instance, in order to get rid of the Duke of *Lancaster*, ceded to him the duchy of *Guienne*, but the people took up arms, and *Richard* revoked the grant: see *Rapin's* History of *England*, vol. i. book x. p. 466 [LORD SELBORNE:—That also is very much against you, for all those French possessions have long ago been ceded without Act of Parliament.] See also *Grotius*, book ii. c. 6, ss. 7, 8, 9, *De acquisitione derivativâ; Phillimore's* International Law, c. 14, pars. 262, 263; *Vattel*, book i. c. 21, sec. 262. If it is held that the Crown has by its prerogative plenary authority to cede, then it might cede *Dover* or the *Isle of Wight* at once. [THE LORD CHANCELLOR:—Not if, in the case of the *United Kingdom*, the *plenum dominium* is in Crown and Parliament together. A Crown colony is distinguishable.] And a Crown colony where Parliament has interfered is distinguishable from a Crown colony where it has not interfered. The Crown can introduce whatever form of government it pleases; if parliamentary government is introduced the regal prerogative to cede is *ipso facto* limited, and except in the case of *Bencoolen*, has never been exercised.

When we made peace with *America* after the War of Independence in 1783, the action of Parliament was distinct. [THE LORD CHANCELLOR:—That was not a case of cession at all.] The words used in the treaty amount to cession. [THE LORD CHANCELLOR:—The Crown recognised a successful revolt of its own subjects, whom Parliament had treated as rebels.] See Parliamentary History, vol. xxiii. col. 354. 22 Geo. 3, c. 46, authorized the Crown to treat with the view to cession; and Mr. *Wallace*, Lord *Rockingham's* Attorney-General, said that he knew of no prerogative which authorized the King to part with his sovereignty. *Lloyd Kenyon*, however, maintained the contrary. Then, again, the cession of *Nova Scotia* and a small portion of *Canada* was made in time of peace; and the question came before the House of Commons in 1783. He referred to the speeches of Mr. *Wallace* and of Sir *Adam Ferguson* in Parliamentary History of that year (col. 517, 518). [Sir *W. Harcourt*:—The treaty of 1783 included a number of cessions, and the House of Commons censured them.] There was also a debate in the House of Lords (see Parl. Hist. vol. xxii. p. 430), and the speeches of Lord *Loughborough* and Lord *Carlisle* were referred to. The latter nobleman referred to the difficulty which arose in the impeachment of Lord *Clarendon*, namely, that of proving that *Dunkirk* had ever become annexed to the Crown; and if that had been proved I say the Crown could not have parted with it without the assent of Parliament. [THE LORD CHANCELLOR:—The expressions there used, passing in the heat of party warfare, do not shew that the power does not exist. If the Government were to cede *Gibraltar* now we should hear similar expressions.] No instance has been adduced on the other side of a cession by the Crown, except of acquisitions made during the course of a war; none whatever of any territory which had ever been the subject of parliamentary legislation. As regards *Florida* and *Minorca*, no Act of Parliament applied to them. [SIR JAMES W. COLVILE:—An Act applied to *Newfoundland*, and yet *St. Pierre* and *Miquelon* were given up by the treaties of 1763 and 1783.] I do not find any Act. [*Stephen*, Q.C.:—15 Geo. 3, c. 31, and a later Act). Those were subsequent to the cession. All the cessions from 1667 to 1783 were of conquered territories unaffected by Act of Parliament.

Now as regards cessions by the Crown in time of peace, Sir *W. Harcourt* has cited four cases and Mr. *Stephen*, six. The only case, however, which resembles this is the case of *Bencoolen*, which is a case against the Respondent. But the Act which recognised it as a Presidency did no more; no institutions were established therein. Next in order is the cession of the *Bay Islands* to *Honduras* in 1859; but no legislative Act had ever referred to them. As regards the *Gold Coast*, no Act of Parliament ever gave it a form of government. [THE LORD CHANCELLOR referred to 6 & 7 Vict. c. 13, and to the cession made in 1867. If that cession was valid it is a case exactly in point.] Then comes the question relating to the *Orange River* territory. The 43rd volume of Parliamentary Documents supplied to the House of Commons contains a history of it.

As to *Dunkirk*, it is very doubtful if it was ever fully annexed to the British Crown: see State Trials, vol. vi. pp. 338–9, the impeachment of Lord *Clarendon*, where the objection was taken that *Dunkirk* had never been annexed by Act of Parliament. *Tangier* was part of *Charles* II.'s dowry; it was given up, and Parliament never had anything to do with it. The cession to the *Netherlands* of the island of *Banca* was, in 1814, at the close of the war; it was a conquered place, and not to be found in the statute book. He referred to the recital of the treaty in State Papers, 1814–15, p. 370. He also distinguished the case of *Guadaloupe* as a conquered island, ceded to *Sweden* as part of a war arrangement in order to induce her to join the coalition. He referred to the speech of Lord *Palmerston* in 1863, relative to the cession of the protectorate over the *Ionian Islands*. [THE LORD CHANCELLOR:—Lord *Palmerston*, who had great knowledge on these matters, stated broadly his opinion to the House of Commons that the Crown could cede any territory of which it was the possessor. Have you any instance of an application to Parliament to authorize a cession?] In the case of conquered territory at the end of a war it would not be necessary; and I am not aware of any cession of territory ever subjected to British legislation. [THE LORD

J. C.
1875-6
DAMODHAR GORDHAN
v.
DEORAM KANJI.

CHANCELLOR :—*Bencoolen* and the *Cape Coast.*] The case of *Bencoolen* no doubt is an exception. [Sir *W. Harcourt* :—Under the treaty of 1783, a large part of *Canada* was ceded which had been legislated for by 14 Geo. 3, c. 83. SIR BARNES PEACOCK :—What do you say about boundary treaties?] They involve questions of geographical difficulty, and a line is drawn by the award of commissioners. [SIR BARNES PEACOCK :—But according to your argument the consent of Parliament and of the inhabitants would be required in order to draw the line.] If the Crown can cede territory what becomes of the allegiance of the inhabitants of that territory? He referred to *Doe* d. *Thomas* v. *Acland* (1). The question there was whether the child of one born after the Declaration of Independence was an alien or not: see observations of *Abbott*, C.J. [SIR MONTAGUE E. SMITH :—The same question would have arisen if the power had been exercised by Parliament.] Yes, but Parliament and the Crown together can absolve from allegiance, the Crown singly can do nothing of the kind. [THE LORD CHANCELLOR :—If the Crown can cede, it can end the allegiance.] Then it was argued on the other side in effect *fieri non debet factum valet*, because the Crown represents *England*; but that involves a question of fact, does the Crown represent *England?* The Crown certainly has no greater prorogative in *India* than in *England.* The cession in this case was made by the Secretary of State under 21 & 22 Vict. c. 106, or Governor General in Council, independent of the Crown, exercising as was thought the powers of the old *East India Company* which were formerly possessed by the Board of Directors and the Governor General in Council. And even if the Crown could not cede *jure coronæ*, there is the further question whether the Secretary of State for *India*, or the Government of *India*, either jointly or separately, could make this cession under any authority given by Act of Parliament to the *East India Company*, the Court of Directors the Board of Control, or the Governor General in Council. He referred to 13 Geo. 3, c. 63, s. 9, and 33 Geo. 3, c. 52, ss. 40, 42, and 43; also to Act VI. of 1859, s. 2. By a series of Acts from 7 Geo. 3, c. 57, Indian territory was vested in the Company down to 3 & 4 Will. 4, c. 85, which continued the possession in it. The

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(1) 2 B. & C. 779.

Crown could not by its executive powers give away such territory, which by Act of Parliament was vested in the Company. Although many cessions took place whilst by Act of Parliament territory was vested in the Company; they were nevertheless all *ultra vires* and invalid. The Company ruled during a state of things which was one more or less of constant warfare. There are two regulations which shew that the Company invoked the legislative rather than the executive power in order to cede territory: *Bengal* Reg. XXII. of 1812, and Reg. VII. of 1816; and the mere cession of territory did not exempt the ceded territory from the jurisdiction of the Company's Courts. See also *Bengal* Reg. VII. of 1822. He then examined several of the Indian cases cited by Mr. *Stephen* to shew that they were either *ultra vires*, or of cession made in time of war. None of those prior to 1858 profess to have been cessions by the Crown at all.

Mr. *J. D. Bell* on the same side:—The treaties, before the Act of 1858 having now been fully examined, it remains to argue on the foundation of the peculiar position of *India* since it was placed under the direct government of the Crown through a Secretary of State. He referred to 21 & 22 Vict. c. 106, s. 1; to 24 & 25 Vict. c. 164, which gave power to Her Majesty by letters patent to establish Courts of Justice, and to transfer territories from one jurisdiction to another. The High Courts were created by Her Majesty, and the charter of 1862, cl. 15, gave a power of appeal from all Courts in the country. In 1865 a new Act, 27 & 28 Vict. c. 15, s. 3, was passed, and fresh letters patent issued, and the power to transfer territories from one jurisdiction to another was withdrawn from the Crown and given to the Governor-General. When an Act of Parliament has given Her Majesty power to legislate, and she has placed a particular district under charter Courts, she has no power by an executive act to transfer the same to another jurisdiction within *India*, and still less to a foreign jurisdiction without: see *Campbell* v. *Hall* (1); *Doe* d. *Thomas* v. *Acland* (2). The cession withdraws from the inhabitants of the territory the protection they had previously enjoyed.

If the Queen has power independently of Parliament to alienate territories, the question raised under the *Indian Evidence Act*, 1872, is out of place, otherwise this judgment holds that a notification published in the *Gazette* does not debar the Courts from inquiring into the validity of the cession. [THE LORD CHANCELLOR :—Is the *Evidence Act* of any materiality except to shew a *de facto* cession?] He referred also to 29 & 30 Vict. c. 115.

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(1) Cowp. 209; 20 State Tr. 239.

(2) 2 B. & C. 779.

Sir *W. V. Harcourt*, Q.C., in reply :—

With regard to the power of the British sovereign, as compared with that of the supreme executive government of the *United States*, see *Story's* Constitutional Law of the *United States*, bk. iii. c. 37, § 1503; also a paper by *Alexander Hamilton* [A.D. 1788], on the cession of 1783, No. 69 of the Federalist, "Comparison between the President and the Kings of *Great Britain* on the one hand, and the Governor of *New York* on the other." Upon the question whether there has been a *de facto* cession, he referred to the notification of the *Bombay* government, which evidenced a handing over of the territory to a political agent, which was equivalent to a cession. It is agreed that without a cession of territory the Crown has no power to transfer the inhabitants thereof from one jurisdiction to another. But so far from the power of the Crown to cede being limited to the occasion of necessity on the conclusion of war, victory has often been accompanied by cession; for example, at the peace of 1763, and by the treaty of 1814. It is true there are certain treaties to which the consent of Parliament is necessary, namely, those treaties in which an express stipulation is inserted that they shall not take effect until approved by Parliament. Those have been principally treaties relating to money loans during war. There was a loan to *Austria* in 1797, to *Portugal* in 1809, the Dutch loan in 1815, and other loans in 1823, 1831, and 1832. Then comes another class of treaties, the Channel fisheries, 1839; extradition treaty with *France* in 1852; the Sardinian loan, 1855; the loan to *Turkey* in 1855; the *Newfoundland* fishery, 1857; the Greek loan in 1864, and the Danubian works loan in 1868. Treaties of commerce are laid before Parliament before they are ratified, one with *France* in 1860, with *China* in 1869, with the *United States* in 1871, and again with *France* in 1872. Therefore there is a parliamentary consent to a special class of treaties, which is not found in the case of cessions. As to the treaty of 1783, made in pursuance of an Act of Parliament passed in 1782, which authorized the recognition of the independence of *America*, negotiations having been forbidden by a previous Act; the effect of it was not to cede territory, but to declare them an independent people, who had been declared rebels by parliamentary enactment. After the negotiations of 1783 were laid before Parliament, the coalition moved resolutions in the House of Commons, in order to turn out the *Shelburne* ministry; the fourth of those resolutions was in condemnation of certain cessions made by the Crown, which nevertheless remained valid. It is admitted on the other side that the Indian cessions enumerated by Mr. *Stephen* were all made, but their validity is denied; in other words, all our relations to the Indian chiefs and their territories are shaken by that argument. *Bencoolen* was just as much legislated for by Parliament as the Presidency of *Bombay* itself; yet it was ceded. The sound principle is, that so long as the territory remains British territory, the Crown cannot alter its internal arrangements and jurisdiction without the consent of Parliament; but the power of cession is paramount, and independent of parliamentary consent. [SIR BARNES PEACOCK referred to 21 & 22 Vict. c. 106. Has the Crown power to give up its prerogatives over territories like the present, which are included under that Act?] That Act is not the origin of the Crown's title. It abolished the trust of the Company, and revived the original title of the Crown in full, which is paramount to the Act. [SIR BARNES PEACOCK:—If *Gogo* is foreign territory, and the jurisdiction of the Indian Courts has ceased, has not the jurisdiction of the Queen in appeal also ceased? And if we reverse the High Court's judgment, are we to affirm that of the *Zillah* Court, which reversed that of the Moonsiff, and which was passed before the cession?] The case would, if the cession is upheld, stand as it stood on the 18th of January, 1866, and every subsequent proceeding would be set aside.

THEIR LORDSHIPS reserved their judgment, and subsequently intimated that it appeared to them that some uncertainty or obscurity existed as to the nature of the transfer or cession of the

J. C.
1875-6
Damodhar Gordhan
v.
Deoram Kanji.

town of *Bhownuggur* and the villages of *Dhundooka* and *Gogo* to the Thakoor of *Bhownuggur*. Further, it appeared to their Lordships that, assuming the point of constitutional law to be determined in opposition to the opinion of the High Court of *Bombay*, the application of this principle to the facts of the case remained to be considered, possibly with this result, that it was not shewn that the cession of territory to the Thakoor was a cession in full sovereignty by the Government of *India* to a native ruler. And their Lordships further intimated that on this point they were prepared to hear a further argument at the Bar.

Accordingly, on the 16th of February, 1876, the case came to be re-argued in reference to the facts of the particular cession in dispute in this case.

Sir *W. V. Harcourt*, Q.C., and *Fitzjames Stephen*, Q.C., for the Appellant.

Forsyth, Q.C., and *Bell*, for the Respondent.

1876
March 28.

On the 28th of March the judgment of their Lordships was delivered by

Lord Selborne:—

In this suit, which was instituted in the British Court of *Gogo* for the recovery or redemption of certain land situate in the village of *Gangli*, on the footing of mortgage, a decree for the Plaintiff (whose representatives are the Respondents here) was made by the Moonsiff of *Gogo*, but was reversed on appeal by the Assistant Judge of *Ahmedabad*. On a special appeal by the Plaintiff to the High Court of *Bombay*, the case was remanded to the Court of *Ahmedabad* for re-trial.

So far there was no question of the jurisdiction of these different Courts over the land in controversy, as territorially situate within their proper limits, and over the parties to the suit as resident within the same limits. But, in 1866, after the remand by the High Court, the jurisdiction of all these Courts is alleged by the Appellant to have ceased by reason of the cession by the British Government of certain territory, within which *Gangli* was included, to a native potentate, the Thakoor of *Bhownuggur*. A notification that the territory so alleged to have been ceded was removed, from and after the 1st of February in that year, from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, appeared in the *Bombay Government Gazette* of the 29th of January, 1866. The District Judge of *Ahmedabad* proceeded, nevertheless, to rehear the appeal, and, on such rehearing, he restored the original judgment of the Moonsiff of *Gogo* in favour of the Plaintiff. Thereupon the Defendant brought another special appeal to the High Court of *Bombay*, alleging the notification in the *Gazette* of the 29th of January, 1866, as proof that the re-hearing had been *coram non judice;* but the High Court, on the 2nd of December, 1870, rejected this special appeal, holding that notification to be insufficient to shew that the jurisdiction of the Court of *Ahmedabad* had ceased before the rehearing. On a petition, however, by the Defendant for a review of that order, accompanied by some further documentary evidence, the High Court appears to have considered that a transfer of lands from British territory to the jurisdiction of a native prince, by the authority of the Secretary of State for *India*, might have been authorized by the statute 21 & 22 Vict. c. 106, s. 3 ; and a review of the order of the 2nd of December, 1870, was therefore directed. On the review, the Judges of the High Court held that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in *India*, in time of peace, to a foreign power; and on that ground they made the order of the 24th of March, 1873, now under appeal, confirming their former order of the 2nd of December, 1870. The question, whether the law thus laid down by the High Court of *Bombay* is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion, which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But having arrived at the conclusion that the present appeal ought to fail without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of *Bombay*, as to be unable to advise Her Majesty to rest her decision on that ground.

Before, however, the judgment, rejecting the special appeal to the High Court of *Bombay* can be reversed, their Lordships must be satisfied that there was, in this case, an actual cession of territory, which had the effect, before the rehearing by the District Judge of *Ahmedabad*, of depriving *Gangli* of the character of British territory, and its inhabitants of the status and rights of British subjects. That question, considered as one of fact in this particular case, apart from the general constitutional question as to the power of the Crown to make a cession in any case, does not appear to have been so fully considered by the High Court of *Bombay* as their Lordships think it deserved to be. It has now (on the 16th of February last) been the subject of a separate argument at this Bar.

The facts material to the determination of this question may be thus stated.

There are in the province of *Kattywar* one or more talooks of large extent and value belonging to the Thakoor of *Bhownuggur*, which (whether that province ought, or ought not, to be regarded as a part of Her Majesty's dominions) have never been brought under the ordinary administration of the British Government in *India*. The Thakoor is also the proprietor of other large talooks (the town and port of *Bhownuggur*, and many other villages and places, including *Gangli*), forming part of the districts of *Dhundooka* and *Gogo*, &c., which, having previously been part of *Kattywar*, were ceded by the Peishwa to the British Government in 1802, by the treaty of *Bassein*. The territory so ceded was left, till 1815, under native administration; but in that year it was brought under the ordinary jurisdiction of the British Courts of the *Bombay* Presidency, and so remained until those proceedings in 1866 the effect of which is now in question. As to these latter estates, the Thakoor, and all his dependents residing thereon, were (beyond controversy) subject to British law and jurisdiction.

Before 1802 the whole province of *Kattywar* was divided between the Peishwa and the Guikowar, who claimed over it sovereign rights, chiefly consisting of the exaction of tribute. A small number of estates in the province were held rent-free; but far the greater part of the chieftains paid tribute of the same character (so far as their Lordships can judge) as the land-revenue which is paid to the Government in *British India;* and Mr. *Aitchison,* in a work of authority, referred to on both sides at the Bar (Treaties, vol. vi. p. 366), states that the sovereignty of the country was understood by the chiefs to reside in the power to which this tribute was paid. The rest of the rights of the Peishwa in those parts of *Kattywar* which had not been transferred to the British Government by the treaty of *Bassein* were ceded to *Great Britain* in 1817.

With respect to the Guikowar (leaving out of consideration one or more talooks, of which that prince is at the present day the direct proprietor), it appears that in 1807 a settlement was made between the Guikowar and the chiefs tributary to him, through the intervention, and under the guarantee, of the British Government; engagements being then taken for the payment of a fixed revenue by those chiefs whose estates were not held rent free. The amount of tribute then fixed for the *Kattywar* estates of the Thakoor of *Bhownuggur* was Rs.74,000; and as it was thought expedient to consolidate the whole of the claims over all the Thakoor's estates, an agreement was made, with his consent, for the transfer of the revenue payable by him to the Guikowar for his *Kattywar* estates to the British Government, as part of the consideration for certain arrangements which were at the same time made for the support of a contingent force. In 1820, by a further agreement, the Guikowar engaged to send no troops into *Kattywar,* and to make no demands upon the province, except through the British Government. Since that date the supreme authority in *Kattywar* (as far as it had been previously vested in the Peishwa or in the Guikowar), has been exercised solely by the British Government. The tribute payable by the different chiefs has been collected by the British authorities, the Guikowar receiving from them the share of it to which he is entitled according to the existing agreements. The tribute payable in 1871 by the Thakoor of *Bhownuggur* (in respect of the aggregate of his *Kattywar* estates and of the estates included in the alleged cession of 1866) is stated in the *Kattywar* Local Calendar and Directory of that year (a book referred to during the last argument as containing correct information on public matters relating to the province) as amounting in the whole to Rs.154,917 per annum, of which Rs.128,060 were collected in right of, and retained by, the British Government; Rs.3999 were collected in right of, and paid over to, the Guikowar; and the sum of Rs.22,858 was a customary sub-tribute, paid, under the name of "zortullubee" to the Nawab of *Joonaghur*, one of the chiefs of the province, who appears formerly to have established some kind of superiority over the rest.

Their Lordships have now to refer to the judicial administration of *Kattywar*. Down to 1831 this appears to have been left, without any regular control, in the hands of the chiefs. But in that year (a Political Agency having been established at *Rajcote* in 1820) the British Government constituted a Criminal Court of Justice in *Kattywar*, under the presidency of the Political Agent, with three or four chiefs as assessors, for the trial of capital crimes in the estates of chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the exercise of their recognised authority over their own dependents. Until 1853 every sentence passed by this Court was submitted to the *Bombay* Government for their approval. (*Aitchison*, vol. vi. p. 367.) In 1862 the whole of this administration was reorganized. The province was then divided into four districts (the eastern district including all the talooks belonging to the Thakoor of *Bhownuggur*), in each of which were placed officers called Political Assistants, with other British magistrates under them, all under the control of the Political Agent. The entire number of *Kattywar* states under separate chiefs (large and small) is 188, of whom 96 pay tribute to or in right of the British Government only, 70 to or in right of the Guikowar only, and 9 (of whom the Thakoor of *Bhownuggur* is one) to or in right of both Governments (*Kattywar* Directory, pp. 54–56). These chiefs were, by the arrangements made in 1862, distributed into seven different classes. To the first class (consisting of four or five, of whom the Thakoor of *Bhownuggur* is one,) unlimited criminal and civil jurisdiction, with the exception of criminal jurisdiction in certain cases over "British subjects" (however that expression ought to be interpreted) was allowed. The jurisdiction of the second class (either originally, or by the effect of a Circular Order afterwards issued, No. 14 of 1866) was substantially the same. The jurisdiction of the four next classes was restricted in criminal matters to limited powers of fine and imprisonment; and in civil matters to the cognizance of suits of limited amount, the greatest powers (those of the chiefs of the third class) being to imprison for seven years, to impose fines of Rs.10,000, and to decide civil suits of Rs.20,000 value; while the sixth class could only imprison for three months, impose fines of Rs.200, and decide civil suits of Rs.500 value. The seventh, or lowest class of all, was entirely deprived of all civil jurisdiction; but in criminal cases might imprison for not more than fifteen days, and impose fines not exceeding Rs.25. All other jurisdiction, both civil and criminal, throughout the province, beyond the limits of that allowed to the chiefs, was reserved to the British officers and magistrates, under the authority of the Political Agent; and in 1871 there was an establishment of thirty-one such officers and magistrates in the whole. (Directory, pp. 520–527.)

In 1863 two elaborate Codes of Regulations (based upon the Indian penal and other codes) were promulgated, with the sanction of the Indian Government, for the guidance of the British judicial officers and magistrates in *Kattywar*. (Directory, pp. 176–253.) These Codes established, both in name and in substance, regular and fully-organised Courts of Justice, with powers to execute warrants and issue commissions throughout the province, and to take security from suspected persons in the name of the Queen. (Arts. 39, 55, 154 of the Criminal, and Art. 104 of the Civil, Code.) It may be added that, on the face of these Codes (especially by Art. 10 of the Civil Code, which pointedly distinguishes the chiefs of *Kattywar* from "Sovereign Powers" and "Independent Chiefs"), and by several later Circular Letters of the Political Agents (No. 11 of 1866, No. 2 of 1867, No. 11 of 1869, and that of the 7th of May, 1868), the whole jurisdiction exercised by the chiefs of all the seven classes is treated as conferred upon them by the British Government.

These being the circumstances which their Lordships think material to a correct understanding of the arrangements between the Indian Government and the Thakoor of *Bhownuggur*, and of the steps taken to carry them into effect, it now becomes necessary to advert to those arrangements. It appears that the difference between the position of the Thakoor in his *Kattywar* estates, in which he continued to exercise his ancient powers, paying a fixed revenue, and his position in his British estates (including his two largest towns and his place of residence), in which since 1815 he had been subject to ordinary British laws, was (in the language of Mr. *Aitchison*, vol. vi. p. 374) "very irritating to him." With a view (among other things) to remove or diminish this source of discontent, an agreement was concluded between him and the Indian Government in 1860, which is printed at pp. 416–420 of the same volume of Mr. *Aitchison's* work.

It is entitled, "Settlement, framed according to resolutions of the *Bombay* Government, Nos. 3826 and 3829, dated 23rd October, 1860:"—a title which has the aspect of an agreement as to rent and other terms of tenure, rather than that of a treaty between the head of a sovereign state and a foreign or independent power. When the particular terms of this agreement are examined, they confirm that impression.

By the 1st and 8th Articles, the Thakoor of *Bhownuggur* and the British Government reciprocally agreed to cancel, from and after the 1st of May, 1861, "the lease of the villages of the Thakoor's talooks in the districts of *Dhundooka*, *Ranpore*, and *Gogo*, which was executed in A.D. 1848," and "instead thereof, the Thakoor agreed to pay, for the whole of the villages enumerated in that lease, a fixed jumma of Rs.52,000 yearly for ever," which sum "shall not be in any way affected by the result of any action or other process brought by any party against the Thakoor's right of possession, in any part of the said talooks; nor shall the said estates (excepting *Bhownuggur*, with *Wudwa*, *Sehore*, and the ten villages thereof, about to be attached to *Kattywar*) be exempted on account of this payment from any general taxation, not coming under the head of land tax or rental, which Government may impose on their districts under the regulations.

It appears, therefore, that the talooks in *Gogo*, including *Gangli*, which were "about to be attached to *Kattywar*," had been included in the lease of 1848, which was then to be cancelled: and that, although the Government did not reserve as to those particular talooks the same right of "general taxation" which they expressly reserved as to the residue of the Thakoor's British estates, which were intended to continue subject to the *Bombay* Regulations, still those talooks were included in the estates in respect of which a fixed jumma of Rs.52,000 was to be paid in perpetuity by the Thakoor.

By the 2nd Article the Thakoor agreed (certain questions of account between himself and the British Government being thereby adjusted) "to pay up his *Kattywar* tribute" (*i.e.*, the jumma for his *Kattywar* property, which had been fixed in perpetuity in 1807), yearly in full, according to settlement."

By the 3rd and 9th Articles it was reciprocally agreed that the port dues and customs of the port of *Bhownuggur* should continue to be collected at British rates, and by the British Government; but that when collected the whole net produce of the port dues and three-fifths of the net produce of the Customs (as "the share of the Thakoor") should be paid over to the Thakoor by the Government, who were to retain, as "the share of Government," the other two-fifths of those Customs.

The town and port of *Bhownuggur* were part of the territory to which the 7th Article (that directly bearing upon the present question) relates. That Article is in these words:—"Upon the above conditions Her Majesty's Government agree as follows: Government concede, as a favour, and not as a right, the transfer of *Bhownuggur* itself, with *Wudwa*, *Sehore*, and ten subordinate villages, from the district of *Gogo*, subject to the Regulations, to the *Kattywar* Political Agency.

This is not the language of cession. It is *primâ facie* nothing more than an engagement for the transfer of the places mentioned (including *Gangli*), which were then, beyond question, British territory, from a regulation province to an extraordinary jurisdiction. The other Articles are consistent with this view.

After the conclusion of this agreement in 1860, a delay of some years followed before anything was done with a view to give effect to the provisions of the 7th Article; "owing" (as Mr. *Aitchison* states, vol. vi. p. 374) "to some doubts as to the precise status of

Kattywar with respect to British laws." In 1865, however, the Thakoor pressed for the completion of the arrangement. In the letter from the Secretary to the Government of *India* of the 31st of May, 1865, to the Acting Secretary of the Government of *Bombay*, the measure is described as "the contemplated transfer of the town of *Bhownuggur*, of the district of *Sehore*, and of the villages in *Dhundooka* and *Gogo*, to the supervision, laws, and regulations of the *Kattywar* Political Agency." By that letter the Governor-General in Council authorized "the contemplated arrangement" being at once carried into effect; with the reservation, however (for which the Government of *Bombay* were directed carefully to provide), that "in the event of gross misconduct on the part of the Thakoor" (of which the Government of *Bombay* were to be the judges) "these territories should revert." A reason was added for holding that "the projected transfer would have been legalised" by the agreement of 1860, viz., that "Her Majesty's Secretary of State for *India* had decided that *Kattywar* was not British territory."

Their Lordships think that if such an opinion had been expressed by the Secretary of State for *India* (of which no direct evidence is found in the papers before them), and if that opinion could be proved to be well founded, it would still not have the effect of converting a transfer of certain British territories from ordinary British jurisdiction "to the supervision, laws, and regulations of the *Kattywar* Political Agency," into a cession of British territory to a native state. Such a cession would be a transaction too important in its consequences, both to *Great Britain* and to subjects of the British Crown, to be established by any uncertain inference from equivocal acts.

Their Lordships assume (though the precise language used does not seem to be quite apt for that purpose) that what was intended was to confer upon the Thakoor of *Bhownuggur* within the "transferred" districts as large a criminal and civil jurisdiction as that which he exercised in his estates situate within the proper limits of the *Kattywar* Political Agency, subject only to the same supervision and control of the *Kattywar* Political Agent to which he was subject in respect of those estates.

But such a grant of jurisdiction (if the Government of *India* or the Crown, without a legislative Act, had been able to grant it), would not have deprived the Crown of its territorial rights over the "transferred" districts, or the persons resident therein of their rights as British subjects. Whatever may have been the opinion of the Indian Government as to the effect of what was done (concerning which their Lordships will only observe that the documents of 1870 and 1871 take it for granted that a cession of territory to a native state had been made, which is the point to be determined), their Lordships' judgment must be founded, not on mere opinions, but on facts; and they find, in point of fact, that there was no cession of territory in this case, unless it can be deemed to have been made by the agreement of 1860, or by the notification in the *Bombay Government Gazette* of the 29th of January, 1866, (issued, no doubt in obedience to the directions of the Indian Government, contained in the letter of the 31st May, 1865); which merely declared, that "in accordance with the Convention, &c." (*i. e.*, with the agreement of 1860), the villages in question were, "from and after the 1st of February, 1866, removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency, and transferred to the supervision of the Political Agency in *Kattywar*, on the same conditions as to jurisdiction as the villages of the talooka of the Thakoor of *Bhownuggur* heretofore in that province."

Their Lordships agree in the reasons given by the Judges of the High Court of *Bombay*, on the 2nd of December, 1870, for holding this notification insufficient for the purpose intended; and they are unable to find in any of the other documents afterwards submitted to that Court on the application for a review any good reason for the subsequent departure of the High Court from that opinion, so far as to admit a review. The second notification of the 4th of January, 1873, which appeared in the *Indian Gazette*, after the review had been ordered, also left the case substantially where it stood before. That notification was merely to the effect that the villages mentioned in the schedule "were on the 1st February, 1866, ceded to the State of *Bhownuggur*." The nature and effect of the act, so described as a "cession to the state of *Bhownuggur*," remains (as it was before) a proper subject for judicial inquiry. What was attempted was, in their Lordships'

J. C.
1876
DAMODHAR GORDHAN
v.
DEORAM KANJI.

judgment, neither more nor less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the regulations and codes in force in the *Bombay* Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed. By the Imperial Statute 3 & 4 Will. 4, c. 85, s. 43, a general power of legislation (with certain exceptions not material for this purpose) was given to the Governor General in Council as to (among other things) "all Courts of justice, whether established by His Majesty's charters or otherwise, and the jurisdiction thereof." This power is, in substance, continued by 24 & 25 Vict. c. 67, s. 22, though the particular clause of the former statute is thereby repealed. By the 24 & 25 Vict. c. 104, s. 9, the High Courts of the several Presidencies were established, with such jurisdiction as Her Majesty should by her letters-patent confer upon them; and under the same statute each of those Courts was also to have and to exercise, "save as by Her Majesty's letters-patent might be otherwise directed, and subject to the legislative powers in relation to the matters aforesaid of the Governor General in Council," all jurisdiction, power, and authority previously vested in any of the *East India Company's* Courts within the same Presidency which were abolished by that Act. It is unnecessary to refer to later enactments, which only modified these provisions in a way not affecting the present case. The jurisdiction, therefore, of the Courts of the *Bombay* Presidency over *Gangli* rested, in 1866, upon British statutes, and could not be taken away or altered (as long as *Gangli* remained British territory) so as to substitute for it any native or other extraordinary jurisdiction, except by legislation in the manner contemplated by those statutes.

Upon two subordinate points in this case their Lordships think it right to add that they agree with the view taken by the High Court of *Bombay*.

Nothing in their judgment turns in this case upon the *Indian Evidence Act* of 1872, s. 113. The Governor General in Council being precluded by the Act 24 & 25 Vict. c. 67, s. 22, from legis-

J. C.
1876
DAMODHAR GORDHAN v. DEORAM KANJI.

lating directly as to the sovereignty or dominion of the Crown over any part of its territories in *India*, or as to the allegiance of British subjects, could not, by any legislative act, purporting to make a notification in a Government gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession. And with respect to the competency of the Courts of the *Bombay* Presidency to proceed with the suit between these parties, if *Gangli* had, by any valid cession, ceased to be British territory, their Lordships agree with the High Court that the foundation of the jurisdiction of those Courts over the subject-matter of this suit and the parties thereto was territorial, and that it could no longer be exercised (whatever might be the stage or condition of the litigation at the time), after such a valid cession had been made.

Their Lordships will humbly advise Her Majesty to dismiss the appeal.

Solicitors for Appellant and Respondent: *Lawford & Waterhouse.*

[PRIVY COUNCIL.]

J. C.*
1876
Feb. 29;
March 1, 2, 8;
May 16.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL . . . DEFENDANTS;

AND

THE HONOURABLE LEWIS THOMAS DRUMMOND . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, IN THE PROVINCE OF QUEBEC.

Expropriation—Action of Indemnity—Compensation—Closing one End of a Street not an Interference with the Rights of the Owners of Houses adjoining thereto—Art. 407 *of the Civil Code of Canada*—27 *&* 28 *Vict. c.* 60 (*Canada*).

App Cas 174
5 App Cas 88
96

Declaration that Plaintiff had built eight houses fronting *St. F. Street*, which at one end opened into *B. Street*, and at the other into *St. J. Street*, and that these houses, being in immediate proximity to the *B. Station* of the *Grand Trunk Railway Company*, had acquired great value as boarding houses and shops; that the Defendant municipal corporation of the city, "without any previous notice to the Plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, *et par voie de fait* closed up *St. F. Street*, and built from the south end of his houses to the opposite side of the street a close wooden fence about fifteen feet in height"; that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress."

Pleas, that the Defendant corporation in closing the street had not committed "*un acte de violence et illégalité ou une voie de fait*"; that they had had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "*et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du demandeur*"; that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say: 1. *L'expropriation forcée;* 2. *Le changement de site des marchés;* 3. *Le changement de niveau des trottoirs;* that whilst acting within the limits of their powers they were not responsible for damage; and that the street "*n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue.*"

It appeared that the corporation closed the street under the authority of a by-law made in pursuance of 23 Vict. c. 72; that the only effect of making the street a *cul de sac*, so far as the rights of access and passage are concerned (apart from the loss of customers), is that the Plaintiff's tenants have to go by other streets and further to reach the southern part of the city. There was no evidence of special damage by reason of the loss of customers; nor of deprivation of light to an actionable degree:—

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Held, that assuming the Plaintiff to have rights in *St. F. Street* which had sustained damage, his property had not been invaded in a way to constitute "*une expropriation*," nor had he established an injury which would give him a right to a previous indemnity under Art. 407 of the Civil Code, so as to make the corporation wrongdoers, and their act in closing the street a trespass and "*une voie de fait*" because such indemnity had not been paid. His claim (if any) should be prosecuted under the provisions of the Act relating to expropriations by the corporation (27 & 28 Vict. c. 60).

By the law of *France* the closing one end only of a street is not such an interference with the rights possessed by the owners of houses adjoining thereto of access and passage as will give a claim to compensation.

The special Acts relating to this corporation must be read in connection with 27 & 28 Vict. c. 60, which prescribes the particular mode in which the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation" should be ascertained. But actions of indemnity for damage in respect of such acts are excluded by necessary implication; for they assume that the acts in respect of which they are brought are unlawful, whilst the claim for compensation under the statute supposes that the acts are rightfully done under statutable authority.

Jones v. *Stanstead Railway Company* (1) approved.

THIS was an appeal from a judgment (June 20, 1874) of the Court of Queen's Bench (appeal side) for *Lower Canada*, confirming with costs in favour of the Respondent above-named a judgment of the Superior Court (September 30, 1872), also in favour of the Respondent. The action in which the judgments were passed was brought on the 27th of July, 1868, by the Respondent, to recover from the Appellants compensation for injury caused to several houses belonging to the Respondent, by the acts of the Appellants in stopping up a street called *St. Felix Street*, under the following circumstances:—

The Respondent had been for many years the owner of a plot of land in the city of *Montreal*, in the form of a parallelogram, bounded at the two ends respectively by *Mountain Street* and *St. Felix Street*, and on one side by *Bonaventure Street*, and on the other side by the railway station of the *Grand Trunk Railway of Canada*.

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(1) Law Rep. 4 P. C. 98.

St. Felix Street, until the events hereinafter mentioned, after passing the property of the Respondent, crossed the railway of the *Grand Trunk Railway Company*, close to the platform at which most of the passengers from the passenger trains alighted, and joined the street on the other side of the railway. In 1854 and 1855 the Respondent built upon his plot of land certain tenements, some of which fronted on *St. Felix Street;* one of which in the south-west corner, abutting on the railway, was in 1866 converted into a small hotel; the houses in *St. Felix Street* were greatly enhanced in value by reason of their proximity to the station, though passengers, in order to reach the street from the platform, were obliged to pass along some yards of railway and cross the switches and sidings, which was contrary to the regulations of the company.

Down to 1862 *St. Felix Street* ran from *St. Joseph Street*, on the south side of *Bonaventure Street*, to *Bonaventure Street*, but in that year it was continued and opened out on the north side of *Bonaventure Street*, and the Respondent paid the Appellants $103. 70*c*. as his share of the expenses incurred in opening out the street.

In the year 1863 the *Grand Trunk Railway Company* obtained an Act of Parliament empowering them to construct in the neighbourhood of *Chaboillez Square* a station for the city of *Montreal*, in pursuance of which they greatly enlarged the old passenger station of the *Lachine* line abutting upon *Bonaventure Street*, and in the same year removed their passenger traffic from some distance outside *Montreal* to the new station. On the 14th of January, 1864, they entered into an agreement with the Appellants to enlarge the station, and transfer thither their goods traffic also, the Appellants undertaking on their part to close *St. Felix Street*, and to open a new street to the south of the station, to be called *Albert Street*.

On the 11th of September, 1866, the following by-law to discontinue a portion of *St. Felix Street* was passed by the council of the city:—

"Whereas it is deemed expedient, in the interest of the public, to open a new street from *Chaboillez Square* to *Mountain Street*, and to discontinue a portion of *St. Felix Street;*

"It is ordained and enacted by the said council, and the said council do hereby ordain and enact:

"That a street to be called *Albert Street* be opened from *Chaboillez Square* to *Mountain Street* at a width of 80 feet English measure; and that that section of *St. Felix Street*, tinted red on the plan hereunto annexed, extending from the line of the said *Albert Street* towards *St. Bonaventure Street* and measuring 171 feet 6 inches, on the south-west line of *St. Felix Street*, and 176 feet on the north-east line thereof, be henceforth discontinued."

The transfer of the business of the railway to *Bonaventure Station* was carried out by the end of 1866; it necessitated the laying of a large number of rails from the station to *Mountain Street*, and the construction of sidings for the shunting and marshalling of trains; and the level crossing at *St. Felix Street* was thereby rendered very dangerous. Thereafter the Appellants, the corporation of *Montreal* (who were incorporated by 4 Vict. c. 36, various powers for the regulation of the city having been conferred on them by successive enactments of the Canadian legislature), in June, 1867, caused to be erected a solid wooden barrier 12 feet high from the southern corner of the Respondent's tenements immediately adjoining the said hotel, across *St. Felix Street*.

The declaration stated that in or about the month of June, 1867, "the said Defendants, without any previous notice given to the Plaintiff, without any indemnity being previously offered to him, forcibly, illegally, wrongfully, *et par voie de fait*, closed up the said *St. Felix Street*, and built up, or caused or permitted to be built, from the south end of his the said Plaintiff's house in the said *St. Felix Street*, to the opposite side of the same street, a close wooden fence, fifteen feet or thereabouts in height.

"That in consequence of the construction of the said fence that part of the said *St. Felix Street* whereon the Plaintiff's houses are built has become a *cul de sac*, the occupants of the houses therein have lost their natural means of egress and ingress, and have been deprived of their ordinary means of support.

"That one of the tenants of the said Plaintiff who occupied several tenements at the south-east corner of the said *St. Felix Street*, at the time of the closing thereof as aforesaid, as a restaurant and hotel or boarding house soon after, to wit, within three weeks from the construction of the said fence, abandoned the premises leased to him by the Plaintiff, for the reason that his business had been entirely destroyed by the closing of the said street as aforesaid; the portion of the said street in question on which the Plaintiff's houses are built has been to a great extent deprived of light.

"That in consequence of the closing up of the said street the costs of making and maintaining that part of the said street which lies before his said houses has been thrown upon the Plaintiff for all times hereafter.

"That he hath been otherwise and still more damnified by the loss of the prospective value of all his said property in the said *St. Felix Street*, the Plaintiff alleging that had it not been for the grievances and trespasses committed by the Defendants, the said last-mentioned property would in all probability, and especially in view of various improvements contemplated and about to be undertaken in the immediate vicinity thereof, have at least trebled in value within three or four years from this day.

"That by reason of all which premises that have been hereinbefore alleged, the Plaintiff had suffered damage to the amount of $6000."

The Appellants, in their plea of the 23rd of September, 1868, traversed the allegations of the Respondent, except so far as they might be directly admitted by the plea, and said they were not responsible for the damages which the Respondent claimed to have suffered; and that, supposing he had sustained damage under the circumstances mentioned in the declaration they were not bound to make him compensation, and proceeded:—

"*Qu'en fermant la Rue St. Félix, les Défendeurs n'ont pas commis un acte de violence, d'illégalité, ou une voie de fait, comme le prétend et l'allègue erronément le Demandeur, mais ils n'ont fait qu'exercer un privilége, user d'un pouvoir qui leur a été conféré positivement par leur charte d'incorporation, et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du Demandeur.*

"*Que dans les différents actes d'incorporation de la Cité de Montréal, le Législateur a désigné spécialement les cas où la dite cité serait tenue d'indemniser les individus pour les dommages qui pourraient* *leur résulter de l'exercice d'aucun des pouvoirs conférés à la dite cité, savoir: 1. L'expropriation forcée; 2. Le changement de site des marchés; 3. Le changement de niveau des trottoirs dans la dite cité; hors ces cas, la dite cité, tant qu'elle n'excède point ses attributions et n'agit que dans les limites de ses pouvoirs, n'encourt aucune responsabilité vis-à-vis des tiers.*

" *En conséquence, les Défendeurs invoquent cette règle de droit, ' Qui jure suo utitur, damnum non facit.'*

" *Que la dite Rue St. Félix n'a pas été obstruée en face des maisons ou de la propriété du Demandeur, et ses locataires ont encore actuellement entrée et sortie par la dite rue, et le Demandeur par suite de la fermeture de la dite rue, dans la ligne sud-est parallèle à sa propriété, n'éprouve aucun dommage par diminution du loyer ou des vues, et il n'est pas obligé à l'entretien de la dite Rue St. Félix plus qu'auparavant.*

" *Enfin les dommages réclamés par le Demandeur sont d'une nature équivoque et incertaine, et il ne peut légalement les établir.*

" *Pour quoi les Défendeurs concluent au débouté de l'action du Demandeur avec dépens, dont les soussignés demandent distraction.*"

The Respondent answered this plea on the 26th of October, 1868, and afterwards by an incidental supplementary demand of the 21st of November, 1870, raised his claim for damages to $12,000.

On the 21st of December, 1870, the cause came on for hearing in the Superior Court before Mr. Justice *Berthelot,* who, on the 29th of April, 1871, gave an interlocutory judgment, ordering that three experts should be appointed to examine and report what was the amount of the damage sustained by the Respondent.

On the 20th of May, 1872, the experts filed separate reports estimating the damages respectively at $2000, $3000, and $4000.

On the 26th of June, 1872, the cause came on again for hearing on the merits before Mr. Justice *Beaudry,* and on the 30th of September, 1872, the Court gave judgment in favour of the Respondent for $3000, with interest and costs.

The present Appellants appealed from that judgment to the Court of Queen's Bench for *Lower Canada,* and the Respondent presented a cross appeal claiming that the damages should be increased, and the two appeals came on for hearing on the 16th of

September, 1873, before *Duval*, C.J., *Badgley*, *Taschereau*, *Mackay*, and *Torrance*, JJ., and were reheard on the 17th of March, 1874, before *Taschereau*, *Ramsay*, *Sanborn*, *Mackay*, and *Torrance*, JJ., and on the 20th of June, 1874, the Court gave judgment confirming the judgment of the Court below, and dismissing both appeals with costs, *Mackay* and *Torrance*, JJ., dissenting.

Mr. *Wills*, Q.C., and Mr. *Gibbs*, for the Appellants.

Mr. *Bompas*, and Mr. *K. Digby*, for the Respondent.

Mr. *Wills*, Q.C., for the Appellants:—

The corporation of the city of *Montreal*, in regard to the act complained of by the Respondent, exercised and did not exceed the powers vested in it by the provincial Act (23 Vict. c. 72), and the other enactments and by-laws under which they had power to discontinue streets. The corporation was not bound, before closing *St. Felix Street*, to offer to pay back to the Respondent the special tax paid by him to the corporation of the city of *Montreal* in 1862 in respect of the extension then made of the street. The Respondent, moreover, did not suffer any special damage from the discontinuance of the street differing in kind or degree from that suffered by the general public. In no case could this action, which is in form for a wrong, be maintained; if the Respondent had any right at all, which is denied, it could only be by way of compensation and not by way of action. In fact, the Respondent was only prevented by the discontinuance of this street from doing that which he had no business to do. He referred to a book of rules and regulations of the *Grand Trunk Railway of Canada*, according to which strangers were peremptorily forbidden to trespass on the company's line or on the lines worked by the company: *Railways Clauses Act, Canada*, Consol. Stat. 22 Vict. c. 66, s. 18. With regard to the powers under which the corporation acted in closing the street, see provincial Act 14 & 15 Vict. c. 128, ss. 58 and 64; 23 Vict. c. 72, s. 10, sub-s. 6; the Council's by-law of the 11th of September, 1866, and 27 & 28 Vict. c. 60, ss. 7, 11, 13, 15, and 18. These sections provide for the necessary expropriation and special assessment consequent

J.C.
1876
MAYOR, &c., OF MONTREAL v. DRUMMOND.

upon the corporation resolving upon any improvements which necessitate the acquisition of real property, and also for the appointment of commissioners to determine the price or compensation to be paid for the same, and for the homologation of the report containing its appraisement by the Superior Court.

It is clear, therefore, that any claim which the Respondent may have would, inasmuch as the corporation acted strictly under its statutory powers, fall to be determined by the commissioners under the last-named Act. The claim which he has instituted for damages assumes that the act complained of was unlawful and wrongful, and therefore the objection to the form of action and procedure adopted is one of substance and not of form, and raises, in fact, the question of jurisdiction on the part of the tribunal to which he resorted. See *Jones* v. *Stanstead Railway Company* (1).

It is contended for the Appellant corporation that it had the power to close this street without granting any compensation at all to the Respondent. When a statute authorizes a thing to be done, and does not expressly authorize compensation for the same, then the doing of the thing authorized is *damnum absque injuriâ*, and the Plaintiff is without a remedy. See *Governor and Company of British Plate Manufacturers* v. *Meredith and Others* (2), which is the oldest case on the subject, and *Dungey* v. *Mayor, &c., of London* (3), which is the most recent. He referred also to *Ferrar* v. *Commissioners of Sewers in the City of London* (4). [SIR MONTAGUE E. SMITH:—We have no general law or general principle by which compensation is given in such cases—it is entirely statutory.] It is strong to shew that there is no general legal right to compensation, that it is expressly provided for in so many particular cases. No statutory compensation is provided in this case, and we say, therefore, none at all can be claimed. The Respondent relies on sect. 407 of the Civil Code of *Lower Canada* that "no one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid;" and contends that this provision is in accordance with the old French law, which is said by him to have required persons who, in the execution of works of public utility, injured the property of others, to make compensation to them.

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(1) Law Rep. 4 P. C. 98, 120.

(2) 4 T. R. 794.

(3) 38 L. J. (C.P.) 298. 4 M (1869) 18 C.

(4) Law Rep. 4 Ex. 227.

It is contended for the Appellant that a destruction of a right of the kind which is the subject of this action never was included under the old French law of expropriation. Sect. 407 of the Civil Code is taken bodily from sect. 545 of the *Code Napoléon.* He referred to sects. 544, 545, and 546 of the latter Code to shew that the ownership there referred to was limited to the ownership of corporeal rights; to *Demolombe*, vol. ix. art. 540, as to sense of the word "*Propriété*;" art. 559, whether it is susceptible of expropriation on the ground of public utility; art. 565, a re-enactment of the common law of *France.* See the French statute of the 3rd of May, 1841, referred to in that article. Also to a French statute of the 16th of September, 1807, on the same subject. These and similar French statutes do not provide compensation in similar circumstances to the present. They bear out *Demolombe's* rule as to expropriation; and, accordingly, the damage alleged in this case does not fall under the head of expropriation, nor can any title to indemnity arise under Art. 407. He referred also to statutes of the 21st of May, 1836 as to road making. (These statutes are to be found in the Appendix to *Royer-Collard's Codes Français.*) There is no French statute which he had been able to find which gives compensation in such cases as this. He referred to *Demolombe,* vol. xii., art. 699, and to art. 700, upon the question whether the right in this case would be one of action or of compensation. He referred to *Husson* (1851), *Législation des Trav. Pub.* p. 329; *Larombière,* vol. ix., p. 511, No. 566–7; *Proudhon, Domaine Public,* vol. i. p. 169, vol. ii. pp. 344, 567; *Sourdat, Traité de la Responsabilité,* vol. i. p. 427, No. 426; *Smith* v. *City of Boston* (1). The intention of the Legislature was to remove cases of this kind from the ground which, under the current of the old French authorities, was a debateable one; and to prescribe the cases, and the only cases, in which indemnity should be payable. Then as to the damage claimed, there is none whatever under English law: see *Ricket* v. *Metropolitan Railway Company* (2). If the case is not within

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(1) 7 Cush. 254 (Massachusetts Cases).

(2) Law Rep. 2 H. L. 175.

27 & 28 Vict. c. 60, s. 18, no compensation can be claimed at all; if it is within that section, it is so for all purposes, and the compensation must be awarded by the commissioners, and not by the Court, in an action of this nature.

Mr. *Gibbs*, on the same side:—

The liability of this corporation (which is itself a creature of statute law, since, although originally created by royal prerogative, it was made the subject of enactment by the Legislature established under Imperial Statutes 3 & 4 Vict. c. 35) to pay damage in respect of its legally authorized acts must be ascertained from the express provisions of statute. [He referred to 14 & 15 Vict. c. 128; 23 Vict. c. 72; and 27 & 28 Vict. c. 60; and to the Civil Code of *Canada*, Art. 362.] Then as to the applicability of Art. 407 of the Code. The Respondent is not deprived of his property within the meaning of that article. [SIR MONTAGUE E. SMITH:—No, but the principle there laid down applies to certain classes of damage. Mr. *Bompas*:—There are numerous cases decided by the Court of Cassation to shew that this case of damage to property is included.] Those cases ceased at a certain time; and the Respondent here is deprived of that which is a servitude under sect. 381 of the Civil Code, as to which see Art. 1589 of the same Code. The distinction is between expropriation, antecedently to which there must be a just indemnity paid, and damage, which is either *damnum sine injuriâ*, or to be compensated for under the special provisions of 27 & 28 Vict. c. 60. As to expropriation, see the law of the 3rd of May, 1841, in the Appendix to *Codes Français;* and for the nature of property, see art. 545 of *Code Napoléon;* and for procedure, compare *Dufour, Droit Administratif*, vol. v. p. 368, with 27 & 28 Vict. c. 60. Although in cases of expropriation recourse was had to the Courts of law, in cases of damage it was to the administrative tribunal, the councils of prefecture, which acted under the law of the 17th of February, 1800: see Arts. 1382–3 of the French Code. It is now settled that every case of this nature, except the expropriation of land, belongs to the jurisdiction of the councils of prefecture. The result of the authorities, at least, is that this is not a case of expropriation: see *Zachariae, Droit Civil Français*, tom. ii. sect. 277; *Sirey* (1852), part ii. p. 91. The Respondent in this case has suffered no damage in respect of which he is entitled to any compensation: see *Dufour, Droit Administratif appliqué,* sect. 233; *Dufour, Exprop.* p. 275, No. 263; *Metropolitan Board of Works* v. *M'Carthy* (1); *Iveson* v. *Moore* (2), cited in *Ricket's Case*; *Beckett* v. *Midland Railway Company* (3).

Mr. *Bompas,* for the Respondent:—

The question is whether under the statutes the corporation can shut up streets without giving compensation to those injuriously affected thereby, or whether under the general law of *Canada* compensation is due. The Respondent has been compelled to give up his property, within the meaning of Art. 407 of the Code, and the Appellants were bound, therefore, as an antecedent condition, to indemnify the Plaintiff. The Canadian Code expresses and does not abrogate the common law of *France* upon this subject; and in *France,* where the laws express the will of the king and not of the people, it was a maxim of the common law that the king could not take private property without compensation. See *Isambert, Anciennes Lois Françaises,* vol. vii. p. 144; *Ordonnance de Charles VI. Paris, Avril* 1407. Consequently the old French statutes do not as the English statutes contain express clauses of compensation. If the king gave a corporation the right to take property for purposes of utility, the common law gave the individual a right to compensation. This right remains unless it is expressly taken away by a Canadian statute. See *Dupeyronny et Delamarre,* p. 7, sect. 10; *Dalloz, Jurisprudence Générale,* tit. "*Expropriation pour utilité,*" sects. 5 and 6; *Sirey,* vol. xxv. pt. 1, pp. 297, 301, where a question arose as to compensation for rights of fishery. A servitude is such a right as gives you a title to indemnity under Art. 545 if you are deprived of it—whether it is called servitude or quasi-servitude. A right of passage throughout the entire street belongs to the owner of every house in it as such a servitude within the meaning of the French law. [He referred to *Proudhon, Traité du Domaine Public,* vol. i. p. 509, Nos. 369, 372, 374; vol. ii. p. 343, Art. 570, and p. 346;

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(1) Law Rep. 7 H. L. 243.

(2) 1 Ld. Raym. 491.

(3) Law Rep. 3 C. P. 82.

Curasson, No. 32, p. 208; *Pardessus, Traité des Servitudes*, vol. i. p. 96, No. 40; *Demolombe*, vol. xii. arts. 699, 700, 701.] [SIR BARNES PEACOCK:—Could the corporation stop up the road, giving compensation to those who had houses on either side, without incurring any liability under French law to others not having servitudes who might nevertheless sustain special damage?] Art. 545 of the French Code includes within its scope all who have real rights, which probably would not include those who had no houses on either side. For French cases, see *Sirey*, vol. xxvi. pt. i., p. 267; *Town of Nantes* v. *Bienassy*, pt. ii., p. 196; *Sirey*, vol. xxix. pt. i. p. 164.

With regard to the Canadian statutes, some of them expressly give compensation in all cases in which they give power to take property for public utility; others, including 23 Vict. c. 72, do not provide for compensation in any case. They do not expressly or impliedly take away the right to compensation; there is nothing in them inconsistent with that right which the common law undoubtedly gives. He referred to 36 Geo. 3, c. 9, s. 44; 3 & 4 Vict. c. 36, s. 43; 4 Vict. c. 22, ss. 18, 27; 8 Vict. c. 59, ss. 48, 59, 63; 15 & 16 Vict. c. 128; 23 Vict. c. 72, ss. 10, 51. The English cases are clear that if an Act gives power to do a particular act without saying anything about compensation, then if injury results from such act, no claim arises for compensation. If on the other hand, the Legislature says you may make by-laws to stop up a street, that means you may make by-laws for that purpose consistently with the rights of third parties. It does not delegate a power to be exercised irrespective of the rights of others. Here the only power given by statute to the corporation is to make by-laws. Stopping up a street does not necessarily interfere with rights of third parties; it may be stopped subject to those rights (if any) being preserved or compensated for. Moreover, the by-laws were passed subject to the general law as laid down in Art. 407 of the Code. Otherwise the by-law made by the Appellants for the closing up of *St. Felix Street* without a previous payment of compensation to persons whose property was taken away or injured was illegal and void. He referred to *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1), where the earlier cases are cited. See 27 & 28 Vict. c. 60, s. 18. The rules of French law on this subject are similar to the rules of English law as laid down in *Metropolitan Board of Works* v. *McCarthy* (1). He referred to three decisions by the Court of Cassation in which Art. 545 of *Code Napoléon*, which is identical with Art. 407 of the *Canada* Code, was relied upon as giving a right to compensation: *Sirey*, vol. xxxvi. pt. 1, p. 601; vol. xxxviii. pt. 1, p. 455; vol. xlii. pt. 1, p. 594. He referred also to *Johnson* v. *Archambault* (2). The result of common law and statute law is to introduce into Canadian law the same rules as to compensation as were laid down in *McCarthy's Case* (1). As to the form of the action, he referred to 37 Vict. c. 51, ss. 21, and the *Code of Civil Procedure*, sect. 144.

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(1) Law Rep. 4 Ch. at p. 146.

Mr. *Digby* on the same side:—

The doctrine that a right of property cannot be taken away without compensation is a principle of French common law; the foundation of it is in the Digest, lib. 43, tit. 8, ch. 3. According to French law, the right of using this street is regarded as a right of property attached to the houses abutting on the street. The French writers do not make any distinction between rights of passing and rights of ingress and egress, &c. They style such rights servitudes or quasi-servitudes: see *Curasson*, p. 208, No. 32; *Solon*, *Servitudes réelles*, Nos. 411, 412, 416; *Toullier*, vol. iii. Nos. 480, 481; *Husson*, p. 530; *Delalleau*, *Traité de l'Expropriation*, p. 86; *Dufour*, *Histoire du Droit Administratif*, vol. v. p. 322. As to the meaning of the word "property," see *Austin's* Jurisprudence, vol. ii. [3rd ed.], pp. 818, 819.

Then, assuming that we have such a right as if interfered with in a substantial way would give a claim to compensation, has such damage been in fact sustained? The action is brought on account of the suppression of the street. The damages are sufficiently direct and substantial; there is a permanent depreciation of the value of Respondent's property in the way of loss of rents, for the houses cannot be let, or are let to indifferent tenants. In this respect the case is distinguishable from the French cases cited on the other side, which were cases of temporary damage. He cited

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(1) Law Rep. 7 H. L. 243.

(2) 8 Low. Can. Jur. 317.

Daubanton, Voirie, p. 238, art. 193, where the distinction between temporary and permanent damage is insisted upon. The former is held to be compensated for by the ultimate advantage accruing from the works complained of.

As to the Respondent's remedy, under French and Canadian law the proper remedy is by common law action, and it is submitted that the same is not taken away by the statutes affecting the corporation of *Montreal.* The Respondent has been deprived of property within the meaning of sect. 407 of the Code, and unless the previous indemnity has been paid, his right to that property or its equivalent remains, and can be enforced by action. In *Jones* v. *Stanstead Ry. Co.* (1), the Plaintiff asked for the demolition of a duly authorized work, and not for an indemnity. Though the work is not illegal the right to the indemnity remains, unless it has been extinguished by a previous payment. Thus the doctrine based upon English statutes, that the right of action is taken away and turned into a statutory right of compensation does not apply. The right is not to ask that the obstruction be removed, but to ask for the indemnity. He referred to *Sirey*, vol. xlii. part 1, p. 594, and vol. xxvi. p. 196. Actions for indemnity are based upon Art. 545 and 1398 of Code *Napoléon,* Arts. 407 and 1053 of the *Canada* Code. The title to compensation here does not rest upon 27 & 28 Vict. c. 60, s. 18, but on principles of common law, which are outside the statute, and are not affected by it. It requires the clearest and most unambiguous terms to justify the construction that a common law right is taken away by statute: see *Sidgwick's* Statutory Law, p. 310. This point was never taken at all in the Courts below, either in the pleadings or in argument. He referred to *Code of Civil Procedure,* Art. 322, and Art. 21. The Respondent is within the principle of this latter article, and has a right which is not taken away by statute. Sect. 18 of 27 & 28 Vict. c. 60, is an enabling section, and does not bind or limit him in any way.

Mr. *Wills,* Q.C., replied:—

The Respondent has attempted to import into the law of *Canada*

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(1) Law Rep. 4 P. C. 98; see especially p. 120.

French statutes and law, which, so far as they are subsequent to 1763, have no application in *Canada.* It is an entire misrepresentation to say that before the Revolution it was a maxim of French common law that compensation was always due in cases where property was taken for public utility. Before the Revolution there was every abuse of seigniorial and other feudal rights; at the time of the Revolution were enacted those violent laws which destroyed the rights of the old feudal aristocracy without compensation. Reverence for the rights of property grew up subsequent to that date; and the Acts of 1807 and 1810, which have been referred to, are now the law of *France.* There is not a word to be found in the writers on the common law of *France* as to this alleged right of compensation. There is a series of edicts relating thereto from the time of *Philippe le Bel* to be found in the first pages of *Delalleau's* work; he referred especially to vol. i., pp. 7–12, and to an edict of 1705. The terms of compensation vary considerably in the different edicts. He referred to *Dalloz's Répertoire,* tit. "*Expropriation.*" The French Code dealt with a state of law which did not recognise an invariable right to compensation. He referred to *Delalleau* in reference to the conflict between the two sets of French Courts on the subject of expropriation and indemnity; and to the laws of 1807, 1810, 1841, 1852, mentioned therein, in reference to the claim of the Prefecture Courts to cognizance of cases of expropriation. A new Court was established in 1843 to deal with the subject, and it decided that the amount of damage belonged to the administrative bodies, whilst cases of expropriation belonged to the judicial authority. According to *Delalleau* the old French law of compensation was purely administrative; and on the cession of *Canada* the administrative law of *France* was not such as could have been or was introduced: see *Abbot* v. *Fraser* (1).

After 13 & 14 Geo. 3, s. 8, *Canada* was subject to legislative decrees; and in the whole series of forty years' statutes, from 31 Geo. 3, to end of Geo. 4, there are forty-five Acts for general and special purposes, involving cession of property, ten relating to roads, twenty-five to bridges, four or five to canals, some to harbours, one to lighthouses, and two to railways, and one to a board of works. Every single Act has its own clauses of compensation, and differs as much as the old French edicts in regard to it, and the method of providing it. The one solitary Act which stops up a particular street without compensation relates to *Montreal*, and is 57 Geo. 3, c. 22. 4 Vict. c. 4, established municipal councils; there was no provision for compensation; but the by-laws which it authorized have no validity until they have been approved by the Governor-General in Council. As regards the power of the corporation of *Montreal*, in reference especially to road making, he referred to 27 & 28 Vict. c. 60, s. 18; 36 Geo. 3, c. 9, ss. 38, 39, 40; 3 & 4 Vict. c. 36, s. 43; 4 Vict. c. 32, s. 18; 8 Vict. c. 59, ss. 52, 53; the subsequent Acts down to 27 & 28 Vict. did not introduce any material change, except that the Act of 1860 authorized by-laws. In 1866 came the Code with its 407th Article; in reference to which he referred to *Demolombe*, vol. ix. Arts. 540, 545, 567; *Delalleau*, vol. i. pp. 88, 92, 209, 210; *Dufour*, tit. "*Expropriation*," arts. 2, 3. The preliminary indemnity spoken of in Art. 545 of the French Code, and Art. 407 of the *Canada* Code, is inapplicable in cases of mere damage, which cannot be ascertained beforehand. The modern legislation, under which cases of expropriation are placed under judicial cognizance, provides a statutory exception to the general rule, which refers cases of a similar nature to the administrative Courts. It is impossible to suppose that under Art. 407 of *Canada* Code, in every case in which special provision had been made for compensation under previous Canadian legislation, the hand of the surveyor or other officer should be stayed until "previous indemnity" had been paid. He then referred to a Consolidation Act, passed in 1874, in reference to *Montreal*, viz. 37 Vict. c. 51, s. 123, sub-s. 37, which gave power to make by-laws. [SIR BARNES PEACOCK:—The statute does not say you may stop up a street, but that you may make by-laws. That is a term of art, and means reasonable by-laws: see *Comyns'* Digest, "Bye-law," C.; and is it reasonable to expropriate without compensation?] That depends on the circumstances of each case; whether direct and material damage has been incurred. He referred to *Dalloz, Juris. Générale*, vol. xlii.

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(1) Law Rep. 6 P. C. 120.

pt. 2. tit. "*Travaux publics*," ss. 816, 821, and case in note to p. 821; *Dalloz, Recueil*, vol. lvi. pt. 3, p. 61; vol. lix. pt. 3, p. 45; vol. lx. pt. 3, p. 2; *Dufour* on Expropriation, p. 279; *Demolombe*, vol. xii. No. 699, p. 198.

1876
May 16.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The action which gives occasion to this appeal was brought by the Honourable *Lewis Drummond* (the Respondent) against the municipal corporation of the city of *Montreal* (the Appellants), for damage sustained in consequence of the corporation having closed one end of *St. Felix Street*, in *Montreal*.

The declaration alleged that the Plaintiff had built eight houses fronting *St. Felix Street*, which at one end opened into *Bonaventure Street*, and at the other into *St. Joseph Street*, and that these houses, being in immediate proximity to the *Bonaventure* station of the *Grand Trunk Railway Company*, had acquired great value as boarding-houses and shops. It then alleged that the corporation, "without any previous notice to the Plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, '*et par voie de fait*,' closed up *St. Felix Street*, and built from the south end of his houses to the opposite side of the street a close wooden fence, about fifteen feet in height;" that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress." It also alleged that the occupant of one of the houses had abandoned it in consequence of the destruction of his business.

The pleas of the corporation (written in French) alleged that in closing the street they had not committed "*un acte de violence et illégalité ou une voie de fait;*" that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "*et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du demandeur;*" that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say:—"1, *l'expropriation forcée; 2, le changement de site des marchés; 3, le changement de niveau des trottoirs;*" and that, whilst acting within the limits of their powers, they were not responsible for damage. The pleas then state that the street "*n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue.*"

The action then is founded on a trespass and wrong illegally committed by the corporation, and the defence, stating it generally, rests on two grounds: (1) that the street was lawfully closed under powers conferred by the Legislature, and therefore no wrong had been committed for which an action in this form will lie; and (2) that the Plaintiff was not by law entitled to any indemnity for the damage complained of.

The following are some of the material facts:—

St. Felix Street opens, near the north end of the Plaintiff's houses, into *Bonaventure Street,* and extends northwards beyond the latter street to *St. Antoine Street.* In its original state it ran southwards from the Plaintiff's houses to *St. Joseph Street.* This part of it was crossed on the level by the lines of the *Grand Junction Railway Company.* The *Bonaventure* station was a short distance from the Plaintiff's houses, the ordinary approaches to it being in *Bonaventure Street.* People could, however, go on foot from the station to *St. Felix Street,* but only by walking over some lines of railway, and contravening, in so doing, the by-laws of the company. It appears that a large number of persons, arriving by or waiting for the trains, went in this manner to *St. Felix Street* and frequented a house kept as a restaurant by one of the Plaintiff's tenants, which they could no longer do by this short cut after the fence complained of was put up. In the years 1863 and 1864 the *Bonaventure* railway station was greatly enlarged, and the goods traffic transferred from another station to it. These arrangements rendered it necessary to carry additional lines of rails across *St. Felix Street* to the south of the Plaintiff's houses, making the passage there difficult and dangerous. To assist these arrangements of the railway company the corporation undertook to close the southern part of *St. Felix Street* and open a new street to the south of the station. The manner in which the corporation in fact closed or shut off this southern part was by placing a wooden barrier or fence, from ten to fifteen feet high, across the street immediately to the south of the Plaintiff's houses. The place where people used to enter *St. Felix Street* from the railway station, as before described, was to the south of this barrier, and the cutting off of this communication caused so great a diminution of the customers of the restaurant that the Plaintiff's tenant gave up the business.

The authority under which the corporation closed the street is a by-law made in pursuance of an Act of the Provincial Legislature (23 Vict. c. 72).

Section 10 of this Act authorized the council to make by-laws for various purposes, and among others (sub-sect. 6), "to regulate, clean, repair, amend, alter, widen, contract, straighten, or *discontinue* the streets, squares, alleys, highways, bridges, side and cross-walks, drains and sewers, and all natural water-courses in the said city."

A general by-law was afterwards passed, sect. 3 of which is as follows:—

"The council of the said city of *Montreal* may, and they are hereby authorized, whenever in their opinion the safety or convenience of the inhabitants of the city shall require it, to *discontinue* any street, lane, or alley of the said city, or to make any alteration in the same, in part or in whole."

And subsequently, on the 11th of September, 1866, a special by-law relating to *St. Felix Street* was made, which, after reciting that it was deemed expedient in the interest of the public to open a new street (describing it), "and to discontinue a portion of *St. Felix Street*," ordains and enacts that a new street called *Albert Street* be opened, and that a section of *St. Felix Street*, describing it by a plan and measurements (being the part to the south of the Plaintiff's houses) "be henceforth discontinued."

It was not disputed that under these powers the corporation might lawfully discontinue this portion of the street, but it was contended that they were bound, as an antecedent condition, to indemnify the Plaintiff for the damage he would thereby sustain, and that erecting the barrier before doing so was an unlawful act and a trespass. The whole case, indeed, of the Plaintiff, so far as this action is concerned, rests on the assumption that his property has been invaded in a way to constitute "*une expropriation*," which, it was urged, could only be lawfully effected in conformity with Art. 407 of the Civil Code of *Lower Canada*, "upon a just indemnity previously paid." It was argued that the statute giving the power to make by-laws to discontinue streets should be held to have been passed subject to the general law embodied in this article.

Art. 407 runs thus: "No one can be compelled to give up his property except for public utility, and in consideration of a just indemnity previously paid."

A similar article is found in the *Code Napoléon* (Art. 545).

These articles undoubtedly embody a fundamental principle of the old French law, which, whilst allowing private property to be taken for purposes of public utility, asserted its generally inviolable nature by requiring previous payment of a just indemnity. They are found both in the French and Canadian Codes under the title "*De la Propriété*," and in both follow the articles which define property or ownership.

The original article in the *Code Napoléon* was in effect the declaration of a principle which, in *France*, has been applied by numerous special laws. In the Canadian Code, also, Art. 407 is supplemented by Art. 1589, which is as follows:—"In cases in which immoveable property is required for purposes of general utility, the owner may be forced to sell it, or it may be expropriated by the authority of law, in the manner and according to the rules prescribed by special laws."

In the special laws passed both in *France* and *Canada*, the principle of previous indemnity in cases of "*expropriation*," properly so called, appears to have been generally maintained. But exceptions have been made in works of urgency; and it is obvious that special laws, when passed by competent authority, may adopt, reject, or modify this principle.

A distinction has long been made in *France*, and indeed it exists in the nature of things, between "*expropriation*," properly so called, in respect of which previous indemnity is payable, and simple "*dommage*;" and a further distinction between direct damage, which gives the sufferer a right to compensation, and indirect damage, which does not.

Great research was displayed by the learned counsel on both sides in investigating the history of French law and procedure on these subjects, the powers conferred on the tribunals, and the conflicts between them. According to the opinion of *Dalloz* the first complete system of procedure is to be found in the Law 8 Mars 1810. A short history of this and other laws upon the subject will be found in *Dalloz's Répertoire,* tit. "*Expropriation,*" c. 1.

It is sufficient for the present purpose to note that a conflict arose under these laws between the ordinary Courts of law and the administrative tribunals, during which numerous decisions bearing on the present controversy took place. It was settled, at least after the Law 8 Mars 1810, that the Courts of law alone had jurisdiction to decide on the indemnity payable to owners of property in cases of expropriation, and that the province of the administrative tribunals was confined to cases of damage; but conflicts constantly arose as to whether particular cases fell within one or the other category, and the claims of owners of houses to indemnity for injury to their servitudes or *quasi*-servitudes in public streets were a fertile source of them.

Demolombe adverts to these conflicts in his *Traité des Servitudes,* and thus sums up the controversy (vol. xii. art. 700). Assuming as he does, that the owners of houses bordering on streets are entitled to indemnity when "*leurs droits d'accès ou de sortie, des vues ou d'égouts*" are suppressed, or injuriously affected, he asks what is the competent authority to determine their claims? His answer is, "*Cette question est elle-même fort délicate. C'est le pouvoir judiciaire suivant les uns, puisqu'il s'agit d'une question de propriété privée. C'est au contraire, d'après les autres, le pouvoir administratif, parce qu'il ne s'agit pas d'une véritable* expropriation, *mais seulement d'un simple* dommage, *quoique ce dommage soit permanent, et nous avons déjà dit* (referring to vol. ix., art. 567), *que telle paraît être aujourd'hui, après beaucoup d'hésitation et de luttes, la doctrine généralement suivie.*" *Delalleau,* in his *Traité de l'Expropriation,* arrives at the same conclusion. (See art. 152, [6th ed.] pp. 85 to 87.)

No doubt in some of the French decisions and authorities the violation of rights of this kind has been treated as "*une expro-*

priation réelle." But in others it has been spoken of as being only analogous to it, as thus: "*comme s'il subissait une expropriation réelle d'une partie de sol.*" (See *Delalleau*, p. 86; *Curasson*, p. 211). Be this as it may, the result of the decisions appears to be correctly summed up by *Demolombe*, and it would seem that in *France* at the present day damage to rights such as "*droits d'accès*" to streets are not deemed to constitute "*expropriation.*" Indeed, upon a reasonable construction of the language of Art. 407 of the Code, it seems to apply to property which can be actually ceded, and for which indemnity could be fixed before it was ceded.

The compensation allowed in *France* for "*dommage,*" as distinguished from "*expropriation,*" seems to be founded on an equitable principle which the special laws have adopted subject to the regulations prescribed in them. But claims for damage, other than that arising from the cession of property, being for the loss caused by the execution of the works and as a consequence of them, it would be unreasonable to require previous indemnity; indeed, in many cases, the extent of damage cannot be previously ascertained. The distinction between the damage which grows from an expropriation, and that which arises from the execution of the works ("*l'exécution ultérieure des travaux*"), is plainly put and illustrated by *Delalleau.* The latter, he says is, "*non la suite de l'expropriation, mais la suite de l'exécution de travaux,*" and he shews how in the nature of things the indemnity for it cannot be assessed beforehand, but should be the subject of a subsequent inquiry, even in the case where an actual expropriation has taken place. (See *Delalleau*, art. 301 to 305.)

Assuming, then, that the Plaintiff had rights in *St. Felix Street* which have sustained damage, their Lordships think he has failed to establish an expropriation, or an injury which would give him a right to preliminary indemnity, so as to make the corporation wrongdoers, and their act in closing the street a trespass and "*une voie de fait,*" because such indemnity had not been paid. It seems to them, that if he has any claim, it is one to be prosecuted under the provisions of the Act relating to expropriations by this corporation (27 & 28 Vict. c. 60), which will be hereafter considered. (See on this point *Jones* v. *Stanstead Railway Company* (1).)

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(1) Law Rep. 4 P. C. 98.

J. C.
1876

MAYOR, &c., OF MONTREAL v. DRUMMOND.

Their Lordships observe that one of the grounds on which Mr. Justice *Taschereau* has sustained the action, instead of sending the Plaintiff to the special tribunal constituted by the Act referred to, is that the parties had submitted to the jurisdiction of the Court, but they are unable to find sufficient evidence of submission or consent in the record to justify this conclusion.

Whilst upon the considerations just referred to, it seems to their Lordships that the present action is misconceived, they are reluctant to determine the case without considering the other points (more nearly touching the merits of the claim) which were argued at the Bar. These were: that the Plaintiff had suffered no injury which, by the French law, would give a right to indemnity; and that, if this were not so, the legislation authorizing the act which caused the damage had taken away the right of action without providing compensation.

It cannot be denied that the law of *France* allows to the owners of houses adjoining streets rights over them, which, if not servitudes, are in the nature of servitudes. *Demolombe* enumerates as undoubted the rights "*d'accès ou de sortie, des vues ou d'égouts*" (vol. xii. s. 699); and the same rights are spoken of by *Proudhon* (vol. i. art. 369). The right of access to a house is of course essential to its enjoyment, and if by reason of alterations in the street the owner cannot get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the law of *France* he is entitled to recover, in some form, indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. The occupiers of the Plaintiff's houses can go from them into *St. Felix Street*, and pass from it into other streets, and through them into all parts of the city. The only effect of making the street a *cul de sac*, so far as the rights of access and passage are concerned (apart from the loss of customers to be presently noticed), is, that the Plaintiff's tenants have to go by other streets, and further, to reach the southern part of the city.

App Cas 97

The counsel for the Plaintiff contended, indeed, that a right of passage throughout the entire street belonged to the owner of every house in it as a servitude, and undoubtedly they were able to refer to some authorities in favour of this view; but the weight of authority appears to be the other way. With all their industry, the learned counsel were unable to find, in the mass of French decisions on this subject, a single case in which it has been held that closing one end only of a street was an interference with the rights of access and passage which gave a claim to compensation. On the other hand, several authorities and decisions were cited to the contrary. *Demolombe,* in discussing the rights of access and other rights in streets (which he acknowledges are servitudes that cannot be interfered with by the Administration without making compensation), considers the passage a man enjoys over that portion of a street which is not necessary for immediate access to his house, to be, not a right, but only an advantage of which he may be deprived without compensation. And among the instances of interference with mere advantages, as distinguished from rights, he gives the following: "*Comme si, par exemple, l'Administration diminuait la largeur de la place ou de la rue, ou même si elle fermait la rue par l'un de ses bouts, de manière à en faire une impasse.*" (Vol. xii. s. 699.)

In *Dalloz, Répertoire,* tit. "*Travaux Publics,*" sec. 816, it is said that, to give a claim to indemnity, according to the constant jurisprudence of the *Conseil d'Etat,* the damage must be material, and the direct and immediate consequence of the works executed by the Administration, and that for indirect damage no indemnity is due. And in sect. 818 he gives, as an instance of indirect damage, "*La dépréciation causée à une maison située dans une rue, qui par suite de travaux publics a été fermée à une de ses extrémités, alors qu'elle reste, du côté opposé, une communication avec autres rues.*"

In *Dalloz, Recueil,* 1856, part 3, p. 61, an important *Arrêt* of the *Conseil d'Etat* is set out, given in a case in which the owner of a house in a street at *Toulouse,* one end of which had been closed, claimed an indemnity of 40,000fr. One of the *considérants* of this *Arrêt,* which affirmed the judgment of the *Conseil de Préfecture* rejecting the claim, is as follows:—

"*Considérant que si la Rue de l'Orme-sec a été fermée aux voitures à celle de ses extrémités qui aboutissait à la dite place, elle est restée ouverte du côté opposé, et se trouve encore en communication avec la* *nouvelle Rue de l'Orme-sec, qu'ainsi la dite maison n'ayant pas été privée de son accès à la voie publique, la dépréciation qu'elle aurait pu éprouver ne constituerait point un dommage direct et matériel qui pût donner droit à une indemnité," &c.*

It certainly then appears that in *France* the depreciation caused to a house by stopping one end of a street, supposing it to remain open at the other, is not regarded as an interference with a servitude, nor (standing alone) such direct and immediate damage as will give a title to indemnity; and if this be so, there seems to be no reason or authority for declaring the law to be otherwise in *Canada.*

The authorities referred to leave untouched the question whether, if a street were stopped at both its ends, indemnity would be payable. It is enough to say that should such a case arise, it might possibly be contended with effect that a virtual destruction of the undoubted rights of access to the houses in the street so closed had been occasioned which would give to their owners a title to indemnity.

It was further contended for the Plaintiff that beyond the mere passage through the street of which the occupiers of his houses were deprived, he had sustained special damage by reason of the loss of customers, who formerly came from the railway station into the street and were now prevented from doing so, and that thus the value of his houses for the purpose of the particular trades carried on in them was depreciated.

But it is to be observed that there was no authorized road from the railway station to this street, and the people who came into it from the station did so in an irregular manner, and by passing over the lines and works of the railway, in contravention of the by-laws of the company. This source of profit was obviously of a precarious kind, and cannot be regarded as permanent. The street does not appear to have been much used, being inconvenient, if not dangerous, from the frequent passing of railway trains, and, apart from the custom of the railway passengers, no special advantage seems to have been derived from its being a thoroughfare. French cases were cited to the effect that the loss of customers (unless, indeed, the right of access as before interpreted is infringed)

J. C.
1876
MAYOR, &c., OF MONTREAL
v.
DRUMMOND.

would not be such a direct and immediate damage as would give a claim to indemnity. (See *Dufour*, "*Droit Administratif appliqué*," 275, 277, 323.) A similar decision was given by the House of Lords in *Ricket* v. *Metropolitan Railway Company* (1).

Whether, if the closing of the street had cut off the Plaintiff's houses from a place the occupiers had long used in connection with them, as from a wharf upon a public river, or had rendered the immediate approach to the houses difficult or inconvenient, he would have been entitled by French law to indemnity upon the principle on which two English decisions, turning upon facts of the kind just supposed, were determined, it is unnecessary to consider. But the present case differs from the supposed ones. The immediate access to the houses is not obstructed, and the occupiers of them had no special object beyond that of their neighbours in going to the part of the city which lies south of the barrier. Indeed, there is no evidence that any inconvenience was felt on this score, and probably none could have been given, for there appears to be another street, easily accessible to the occupiers of the Plaintiff's houses, by which this part of the city can be reached, and which, whilst only a little further, is probably more commodious, being less liable to obstruction from the operations of the railway. The gravamen of the damage, as proved, was the loss of the custom of the railway passengers already adverted to. No doubt the distinctions in the cases on this subject are fine. The English decisions (which are only referred to by way of illustration) as well as the French have been conflicting, and the boundary lines between them are in consequence somewhat indistinct. (See *Metropolitan Board of Works* v. *McCarthy* (2); *Beckett* v. *Midland Railway Company* (3).)

One ground of damage complained of is due not to the discontinuance of the street, but to the manner of closing it. It is said the barrier which has been erected darkens the Plaintiff's houses.

It may be that the Plaintiff has some ground of complaint on this head, but he has not alleged in his declaration that the windows of his houses have been deprived of light, but only that the street has been darkened; nor does the evidence distinctly

(1) Law Rep. 2 H. L. 175.
(2) Law Rep. 7 H. L. 2~~1~~3. 4/
(3) Law Rep. 3 C. P. 97.

J. C.
1876

MAYOR, &c., OF MONTREAL v. DRUMMOND.

shew a deprivation of light to an actionable degree, nor is such a deprivation found as a fact by the experts or the Judges. The great contest in the cause has been as to the damage arising from the suppression of the street, and not that due to the form of the barrier. Throughout Mr. Justice *Taschereau's* judgment, in which that learned Judge ably supports his own view, there is no allusion to loss of light as a substantive grievance. If, however, this or other damage has been occasioned by the proximity of the barrier, it would be recoverable, if at all, under the corporation statutes. The amount of damage assessed in the action is, in the main, given in respect of loss of custom and the consequent depreciation in the value of the houses.

The other questions argued turned upon the special statutes relating to the corporation. It was contended that these Acts excluded an action for indemnity, and gave no compensation in cases like the present. For the Plaintiff it was denied that the action was thus excluded, but it was said that, if taken away, compensation was given.

Upon the English legislation on these subjects, it is clearly established that a statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation and some procedure for assessing it; but it is a well understood rule in *England* that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are "injuriously affected"—words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority.

In the Canadian Act (23 Vict. c. 72) authorizing the by-law in question, no compensation is expressly provided for the damage which may be caused by any of the acts it authorizes to be done. But in a previous Act (14 & 15 Vict. c. 128), provision for compensation is expressly made in two instances. Thus, the power to make by-laws for altering the footpaths or side-walks of any street is conferred subject to the provision "that the council shall make compensation out of the funds of the city to any persons whose property shall be injuriously affected by any such alteration of the level of the footpath in front thereof." And the power to make by-laws for changing the sites of markets and appropriating the sites, saves to any party aggrieved "any remedy he may by law have against the corporation for any damage he might thereby sustain."

The counsel for the corporation referred to two or three other instances of express provisions in former Acts relating to this corporation, and also to sets of Acts authorizing roads, bridges, and other public works, which provided compensation in express terms, and contended that it might be inferred from this course of legislation that the intention was to exclude compensation whenever it was not expressly given.

On the other hand, the counsel for the Plaintiff relied on the fact that no compensation was provided by the Act authorizing the by-law in question, although the power it conferred would, it was said, justify an interference with property, and with undoubted servitudes, and also upon the difference between English and French law, arising from the existence of the article of the Code, and the dissimilar systems of procedure in the two countries. Their contention, in substance, was that the special Acts should be read with and subject to Article 407 of the Code in the cases to which it was applicable, and also to the general law which gave, in certain cases at least, a right to indemnity for damage.

Whatever may have been the effect of the special Acts relating to this corporation before the passing of the 27 & 28 Vict. c. 60, they must now be read and considered with it. That Act is indeed a Statute upon expropriations. After reciting in the preamble that much difficulty was often experienced in carrying out the law in force relating to expropriations for purposes of public utility, it establishes a tribunal consisting of Commissioners for determining the value of property expropriated, and a system of procedure for such cases. Then the 18th section enacts that these provisions shall be extended to all cases in which it becomes necessary to ascertain the compensation to be paid for any damage sustained by reason of any alteration in the level of footways made by the council, or by reason of the removal of any establishment subject to be removed under any by-law of the council, "or to any party by reason of any other act of the council, *for which they are bound to make compensation.*"

It was contended for the corporation that this general clause referred only to such compensation as was expressly mentioned in their statutes, though they could only point to two instances of such compensation which could satisfy the words, and these were contained in a Road Act (36 Geo. 3, c. 9), the powers of which were transferred to the corporation. Whilst for the Plaintiff it was said that if it be held that actions for indemnity are taken away, this sweeping clause ought to be construed so as to comprehend all cases of damage for which, by the general law, indemnity would be due, and as being in effect equivalent to the common clause in the English statutes containing the words "otherwise injuriously affected."

Reading the clause in the latter sense compensation would be expressly given by it to all who may suffer—to use the English phrase—actionable damage. A provision to this effect, if it be made, would no doubt be equitable and reasonable; whereas if it be not made the scheme of compensation provided by these Acts would seem to be defective. Their Lordships, however, do not think it necessary to decide in this appeal the question thus raised, since, in whatever manner it may be determined, and whatever may have been the case before the 18th section of the 27 & 28 Vict. c. 60, was passed, they think that this enactment, by requiring that the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation," shall be ascertained in the manner prescribed by the Statute, excludes, by necessary implication, actions of indemnity for damage in respect of such acts. It is enough, therefore, to say that in their view the corporation, having acted within their powers, the Plaintiff's claim (if sustainable at all) is of a kind which would fall to be determined by the Commissioners under the special Act.

It may be observed that the question of procedure in cases of

J. C.
1876
Mayor, &c., of Montreal v. Drummond.

this kind is not merely a technical one. This was pointed out in the judgment of this Committee in *Jones* v. *Stanstead Railway Company* (1). It is there said: "The claim for damages in an action in this form assumes that the acts in respect of which they are claimed are unlawful, whilst the claim for compensation under the Railway Acts supposes that the acts are rightfully done under statutable authority; and this distinction is one of substance, for it affects not only the nature of the proceedings, but the tribunal to which recourse should be had."

On the whole case their Lordships find themselves unable to concur in the judgment pronounced by the majority of the Judges of the Court of Queen's Bench, and they will humbly advise Her Majesty to reverse both the judgments below, and to direct that the action be dismissed with costs. The Respondent must pay the costs of this appeal.

Solicitors for the Appellants: Messrs. *Wilde, Berger, Moore, & Wilde.*

Solicitors for Respondents: Messrs. *Bischoff, Bompas, & Bischoff.*

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(1) Law Rep. 4 P. C. 98.

[HOUSE OF LORDS.]

H. L. (E.)
1876
May 9, 11.

ANDREW LOWS . . . . APPELLANT;

AND

EDWARD TELFORD AND ROBERT WESTRAY . . . . RESPONDENTS.

Forcible Entry—15 Ric. 2, c. 2—Mortgagee in Fee.

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Where a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of the statute against forcible entry.

It will do so though the possession of the person having such legal title has only just commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, and though the person who attempts to eject him may even set up a claim to the possession of the land.

L. became the mortgagee in fee of certain premises of which it appeared that he did not at once take actual possession. The mortgagor, whose possession had not been interfered with, made an agreement with *T.* and *W.* to allow them (at a rent) the use of these premises, and for some little time *T.* and *W.* did have the use of them and deposited goods there. On one morning at an early hour *L.*, without notice to any one, went accompanied by a carpenter and another man, and, by taking off the lock of the outer door, entered into actual possession. *T.* and *W.* hearing of this went to eject him, and not being able to get in at the door obtained an entrance through a side window, then came down and did eject *L.* On this *L.* indicted them for a forcible entry; they were acquitted, jointly paid their attorney's bill, and then brought a joint action against *L.* for malicious prosecution without reasonable and probable cause:—

Held, that, on these facts, they could not sustain the action, and that *L.* was entitled to have the verdict entered in his favour

Quære, whether a joint action by *T.* and *W.* could in such a case have been maintainable.

Per LORD SELBORNE:—If for civil purposes the legal possession was then in *L.*, the foundation for a charge of forcible entry, so far as possession is concerned, was sufficiently established.

APPEAL (on a case agreed on by the parties) against a judgment of the Exchequer Chamber, which had reversed a previous decision of the Court of Exchequer.

The Appellant had, in August, 1868, become the mortgagee in fee, for £250 and interest, of some premises situated in the borough

H. L. (E.)
1876
Lows
v.
Telford

of *Carlisle*, which were the property of one *Alfred Tweddle.* The title deeds were handed over to *Lows*, but he did not take actual possession of the premises. On the 19th of October, 1868, *Alfred Tweddle* who, as it was stated in the case, "had acquired very intemperate habits," executed to his two brothers a deed of settlement for the benefit of his family. In December, 1868, he executed a second mortgage on the premises for £200 in favour of *Lows. Alfred Tweddle* was however still allowed to continue in the apparent possession of the premises, and in November, 1869, entered into an arrangement with *Telford*, by which *Telford* was to pay him £20 a year for the use of them. They were not inhabited as a house, but occupied as a sale-room and warehouse. *Westray* used a part of them under an arrangement with *Telford.*

On the morning of the 14th of July, 1870, *Lows*, who had not given notice to any one of his intention to do so, went accompanied by two men, one of whom was a carpenter, and took possession of the premises by taking off the lock of the outer door, and so effecting an entrance. One of the men went into the building itself. While the other man, the carpenter, was engaged, with the door half open, in putting on a new lock, *Lows* being with him at the time, *Telford* and *Westray* attempted to turn away *Lows* and the carpenter, but did not succeed. After a time they effected an entrance into the premises by a window and did then forcibly eject *Lows*. On this *Lows* indicted them at the borough sessions of *Carlisle* for a forcible entry. The jury acquitted them, and they then brought a joint action against *Lows* for a malicious prosecution without reasonable and probable cause. The trial took place before Mr. Justice *Mellor* at the *Manchester* Spring Assizes, 1872, when it was proved that on the indictment they had defended themselves by the same attorney, whose bill was taken as amounting to £55. It was contended for *Lows* that there was no proof of malice, and that the circumstances shewed reasonable and probable cause, and it was also submitted that there was no joint cause of action. The learned Judge was of opinion that the Plaintiffs had established a cause of action, and a verdict was taken for the Plaintiffs for £55, but leave was reserved to *Lows* to move to enter the verdict for him. On motion, the Court of Exchequer ordered that the verdict should be entered for the Defendant. On appeal to the

Exchequer Chamber that judgment was reversed. This appeal was then brought.

Mr. *C. Russell*, Q.C., and Mr. *Trevelyan*, for the Appellant:—

The legal title to the premises was in the Appellant. That being so he had a right to take actual possession of them at any time, even without notice to persons who had got into occupation of them. For that occupation was only upon sufferance: *Smartle* v. *Williams* (1). The fact that such an occupier had put goods into the premises gave him no title of any sort against the legal owner: *Littleton* (2). But the case here was still stronger than that, for the evidence shewed that the legal owner was in actual possession of the premises when the unlawful attempt was made to turn him out. The Respondents were thus in a less favourable position than a tenant who held over after his term, as to whom it had been decided that he could not distrain his landlord's cattle for trespassing, though they had been put there by way of taking possession: *Taunton* v. *Costar* (3). The door had been opened, one of the men who accompanied *Lows* was in the house, and the other, the carpenter, was employed with the open door in the work of putting on a new lock. The attempt to turn out the Appellant was, therefore, an act wholly illegal, and brought the parties who made it within the provisions of the statute against forcible entry, and made them liable to indictment. The act of preferring the indictment could not therefore be properly alleged as malicious and without reasonable and probable cause. *Co. Litt.* (4), *Comyns'* Digest (5), *Bacon's* Abridgment (6), *Anonymous* (7), *Partridge* v. *Bere* (8), *Butcher* v. *Butcher* (9), *Jones* v. *Chapman* (10), and Mr. Justice *Maule's dictum* there (11), were cited and relied on.

In point of form the action here was not maintainable. It was a joint action, whereas there was no joint injury, for the damage, if any, must have been to each individual separately. A joint action for an alleged wrong to different persons could not be sustained, except in the case of partners who were affected in their partnership interest, or in the case of a husband and wife where the law assumed, for many purposes, the identity of the parties, though even in this latter case it was doubtful whether, on account of a joint interest in land, a husband and wife could join in an action of trespass: *Anonymous* (1).

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(1) 1 Salk. 246.

(2) S. 69.

(3) 7 T. R. 431.

(4) 56 b.; see also Co. Lit. 205 a, n. (1).

(5) Estate H. 1, 2.

(6) Forcible Entry, D.

(7) 1 Salk. 246.

(8) 5 B. & Ald. 604.

(9) 7 B. & C. 399.

(10) 2 Ex. 803.

(11) Ibid. 831.

Mr. *Herschell*, Q.C., and Mr. *Kenelm Digby*, for the Respondents:—

The verdict here was completely justified by the facts, and those facts shewed that there was no reasonable or probable cause for the prosecution. The case was one for the jury on the point of malice. The Respondents were in possession. That possession was unlawfully and violently disturbed by the Appellant. It was he who had in reality effected a forcible entry, and the Respondents had only endeavoured to defend a possession which they believed themselves rightfully entitled to, for they had received it from *Tweddle*, who was the original owner of the premises, and whose authority over them had never appeared to be interfered with. The Respondents had a title to the occupation of the premises, which they would have been entitled to set up even in trespass *quare clausum fregit: Jones* v. *Chapman* (2). The right of the legal owner might be complete in law, but he was not, especially without notice, justified in asserting it as this Appellant had done. He took possession by force without previous notice to any one. [LORD SELBORNE mentioned *Keech* v. *Hall* (3).] But that was a proceeding in ejectment, as to which the rule in *Jones* v. *Chapman* (2) would be applicable. In *Taunton* v. *Costar* (4), while declaring in the fullest way the right of a landlord to the possession, Lord *Kenyon* said, "If indeed he had entered with a strong hand to dispossess the tenant by force he might have been indicted for a forcible entry." Now that was exactly what the Appellant had done here, and he, and not the Respondents, had been guilty of the offence against the statute. The Appellant here had no right to resort to force:

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(1) Dyer, 305 b. pl. 59.

(2) 2 Ex. 803.

(3) Dougl. 21.

(4) 7 T. R. 431.

Newton v. *Harland* (1). He had no possession—it was out of him—he had allowed it to appear to belong to another, and without full possession he could not, on the principles of the most ancient law, complain against another of an attempt to dispossess him: *Savigny* (2); the Pandects (3). There was no pretence for charging the Respondents with any offence; but if not, then the making of such a charge without a reasonable and probable cause was proof of malice, and all the essentials for maintaining the action were complete: *Comyns*' Digest (4); *Mitchell* v. *Jenkins* (5).

The action was right in form. The damage of which the Plaintiffs complained was an entire damage which they jointly suffered, and against which they were entitled to be jointly relieved. There was no principle of law opposed to this joint claim of damages where the injury was joint. Indeed, in the earliest case upon the point *Coryton* v. *Lithebye* (6), the bringing of a joint action had been declared to be the better course, "for otherwise damages will be twice recovered." *Cook* v. *Batchellor* (7); *Collins* v. *Barratt* (8); *Pechell* v. *Watson* (9); *Forster* v. *Lawson* (10) were all cases where the form of action was joint in respect of a wrong jointly affecting different individuals (11).

Mr. *Trevelyan* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in the view which I take of the case now before your Lordships there is little, if anything, to be determined in point of law, but the decision of the case appears to me to depend mainly, if not altogether, upon a just appreciation of the facts which appear upon the special case.

My Lords, the story of the transaction which has led to this litigation appears to be this: There was a tenement in *Carlisle*, not a house where any persons were residing, but premises where goods were stored or kept. This, on the 14th of July, 1870, when the circumstances which are the subject of the litigation occurred, belonged to a person named *Lows*, as the mortgagee in fee. *Lows* therefore had the legal title, and, not having parted in any way with the right of possession, he might have taken possession at any time by any means which the law allowed him to use. The mortgagor was a person of the name of *Tweddle*. He was not in possession himself, but he had authorized two persons, who were named *Westray* and *Telford*, to occupy the premises. There was some kind of agreement for the occupation, although it does not appear to have been reduced to writing, and something was said about rent. But that is quite immaterial, because it is obvious upon the statement in the case, that *Westray* and *Telford* occupied by the consent of *Tweddle*; therefore their occupation was just the same as if *Tweddle* himself had occupied. It was not higher, and I am willing to take it as being a right of occupation as high as that which *Tweddle* himself had.

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(1) 1 Man. & Gr. 644.

(2) Sir *E. Perry's* trans. 169.

(3) *De Acq. Poss.*

(4) Forcible Entry, A 2.

(5) 5 B. & Ad. 588.

(6) 2 Wm. Saund. 112–116.

(7) 3 B. & P. 150.

(8) 10 B. Moo. 446.

(9) 8 M. & W. 691.

(10) 3 Bing. 452.

(11) See this matter fully discussed in *Le Fanu* v. *Malcolmson*, 1 H. L. Cas. 637.

It appears that on the 14th of July, 1870, *Lows* wished in this state of things to obtain possession of the tenement himself. He might have gone and demanded possession, and he might have got a judgment if that demand had been refused. The course, however, which he appears to have resorted to was this: The premises had been locked up on the night of the 13th of July, and very early in the morning of the 14th, before 6 o'clock, *Lows* went there, accompanied by two other men, one of whom was a joiner and carpenter. They appear to have opened the door, and, I infer from the statements, to have taken the old lock off. One of the men accompanying *Lows* was inside the house, *Lows* himself was on the doorstep, and the third man, the joiner or carpenter, had the door open before him, and was engaged in boring holes in the door for the purpose of putting on a new lock.

My Lords, if I had been asked the question what the position of things at that moment was, I should have said, undoubtedly, *Lows* was in actual possession. He had obtained possession in a very rough and uncourteous way, and what the reasons were which induced him to take that course are not before your Lordships. But we have nothing to do with the roughness or discourtesy of the mode, we have to do with the facts of the case, and the facts of the case appears to me to shew that, as I have said, at that time *Lows* had possession of the house by one of his agents who was inside, and he himself had command of the door, for *Lows* was standing on the step, and the carpenter was standing in the doorway holding the door, and putting a new lock on it.

That was the state of things when *Westray*, one of the two persons who were allowed by *Tweddle* to occupy the premises, came up. He had been told by some person what was going on. When he came up he objected to the proceedings which were going on with respect to the door. However, *Lows* and the carpenter with him maintained their ground; they refused to give way, and either to allow *Westray* to enter, or to discontinue their work. Accordingly, *Westray* went for a policeman, but he could not find a policeman, and then, apparently, he went for *Telford*, who appears to have been a brother-in-law of his. Then they came to the premises. By this time, as I infer, the carpenter had gone inside, and had closed the door, and had put against the back of the door a spur, or piece of timber, which, resting on the ground, prevented the door from being opened for above four inches, and prevented any person from going in. The agents, therefore, of *Lows*, being in possession of the house, maintained their ground, and the door could not, I infer, have been forced open, but might have been forced open but for this circumstance. A lad in the interest of *Westray*, got a ladder, put it against an open window, or a window which he opened, and got into the house through the open window; *Westray* followed him, and then coming to the back of the door where the spur or piece of timber was placed, they removed the spur or piece of timber, opened the door thereby, and allowed any person who was able to come in at the open door. There was then a scuffle, a contest of pushing and violence between the parties, and, as I infer, *Lows* was pushed away from the door with some degree of violence, and there were several persons in the street taking part in the scuffle which was going on.

That, my Lords, is the history of the case. Thereupon *Lows* indicts *Westray* and *Telford* for a forcible entry. He indicts those two with other persons, who do not take any proceedings, but he indicts those two. They are acquitted on the trial at quarter sessions. They appear to have together defended the indictment, and incurred costs to the amount of a sum of £55, and they bring this action against *Lows* for indicting them without any reasonable and probable cause, and with malice. At the trial of this action the damages were agreed upon, and a verdict was entered for the Plaintiffs, with liberty to the Defendant to move to enter a verdict for himself. The Judges in the Exchequer, before whom the case first came, were unanimously of opinion that there was reasonable and probable cause for the indictment, and that, therefore, the verdict should be entered for the Defendant. But the Judges in the Exchequer Chamber were, also unanimously, of a different opinion, and held that there was no reasonable and probable cause for the indictment, and that, therefore, the verdict should stand for the Plaintiffs.

17 Ch D

I am bound to say that in that state of things I am unable to arrive at any other conclusion than this, (differing in opinion with great respect from the Judges of the Court of Exchequer Chamber,) that there was reasonable and probable cause for this indictment. That there was the violence attending the transaction which would be necessary to bring it within the statute, was not in any way denied, and the whole question turns upon this: at the time when that violence took place was *Lows* in possession of these premises, or were they still in possession of *Westray* and *Telford*, so that in point of fact and truth *Westray* and *Telford*, in place of entering upon the possession of others, were merely defending a possession which was their own? I repeat what I have already said, that as I view the facts already stated, the possession which *Telford* and *Westray* were found to have had, was put an end to by the proceedings of *Lows* on the morning of the 14th of July. Whether those proceedings were, I repeat, all that we should have desired to see, whether they were courteous or discourteous, rough, or the contrary of rough, is immaterial; they were the proceedings of one who had a right to take possession, who took possession by the way that I have described, and who, it may be, not for any great length of time, but for a definite and appreciable length of time, obtained and retained possession of the property. From that possession he was dislodged by the means I have stated. Those means appear to me to have amounted to a forcible entry, and I think, therefore, it would be impossible to hold that there was not a reasonable and probable cause for preferring the indictment that was preferred.

My Lords, I will only add to what I have already said, that if I look to the evidence of *Westray* himself, one of the Plaintiffs, it is almost impossible not to see in every sentence of it, that he himself states the case exactly in the way that I have stated it, namely, that *Lows* had obtained possession, and that *Westray* and *Telford* were endeavouring to retake possession as against *Lows*. He says, " On the morning of the 14th of July, 1870, my workman, *John Bradley*, told me what was going on. ' I found ' (he says) ' *Lows* standing on the doorstep; the man was behind him. He was not putting on a new lock, but boring holes in the door. There was also at least one other man in possession farther in.' " Now, that other man was, as I have said, an agent of *Lows;* " I certainly thought it very wrong on *Lows*' part. I have no doubt that *Lows* was there, and his men, to take possession of the place and to keep it if they could." Farther on, he says, " what happened was, that *Telford* and the others, with my assistance, succeeded in putting out the persons in the house and *resuming possession* of the house myself." And then farther on—" I thought *Lows* had no right to *take possession* in the way he had done." And again, on being asked whether " *Lows* having got possession in the way that has been described, ' Did he not shew fight to resist the witness taking possession '?—(*A.*) ' Certainly, he did. They resisted as far as they could my taking possession.' "

My Lords, I am unable to appreciate the meaning of words if this is not the strongest statement, several times repeated, by one of the Plaintiffs themselves, that they were put out of possession and that they were endeavouring to retake possession against *Lows*.

I turn now to the opinions of the learned Judges of the Court of Exchequer Chamber. Passing over that of Mr. Justice *Blackburn*, which it would hardly, I think, be fair to criticise, because it is so imperfectly rendered (1), I take the expression of opinion of Mr.

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(1) The case was not reported in either of the Courts below, but notes of the trial and of the judgments had been furnished to their Lordships.

Justice *Keating* as shewing the ground upon which the Court proceeded. Mr. Justice *Keating* says: "If in this case the facts had shewn that the Defendant having the right, which he unquestionably had, of possession, had taken possession, and having taken possession the Plaintiffs had entered on that possession, why then I should have said there would be reasonable and probable cause for indicting the Plaintiffs for a forcible entry." My Lords, I think that exactly describes the condition of the argument, but I venture to think the conclusion at which Mr. Justice *Keating* arrives is erroneous. I think it is exactly the case that the facts shew that "the Defendant had the right of possession," and "had taken possession," and "having taken possession, that the Plaintiffs had entered on that possession." Farther on, Mr. Justice *Keating* continues, "That brings the question to a question of fact—had he taken possession? Now, it seems to me that in order to constitute possession it must be a complete possession exclusive of the possession of any other person, and here, I think, the facts shew there was no such possession taken. All that occurred seems to have occurred in the nature of an act, and the transaction was this. The Defendant was endeavouring to take possession, and the Plaintiffs were resisting him." My Lords, I think that is a mistake. *Lows* had taken possession—there was no resistance whatever—there was nobody there to resist, he had taken possession and that act was completed. Mr. Justice *Keating* continues: "That seems to me to furnish no foundation for an indictment for a forcible entry on the part of the Plaintiffs, who were defending a possession which they partially had had, at all events, for a considerable time." There again, my Lords, I think there is a misapprehension. They were not defending their possession—they had lost their possession, and they were endeavouring, as *Westray* himself says, to retake that which they had lost.

My Lords, all that I have said is quite consistent with the verdict of the jury. The jurors acquitted the Defendants in the indictment, the Plaintiffs in the present action; and I am not in the least surprised that they did so. Jurymen do not always proceed upon strictly logical grounds, and I can readily imagine that the jury, seeing the manner in which this transaction was accomplished, seeing the want of any notice or information given before *Lows* took possession, would decline altogether to convict those who, under such circumstances, were indicted for a forcible entry. But the case before your Lordships is not whether the jurors were right or whether they were wrong, or whether those Defendants ought to have been convicted upon the indictment. The question now is, whether those who were indicted, and who escaped in a way which no person, I think, can be surprised at, can turn round and maintain an action in which they must affirmatively shew that there was no reasonable or probable cause for preferring the indictment. That, I think, it is impossible that they can do, and therefore, in my opinion, the decision of the Court of Exchequer was right, and the verdict must be entered for the Defendant.

My Lords, I will only add that it becomes unnecessary to decide the other question which has been raised, namely, whether these two Plaintiffs could join in the action which they have brought for having been indicted without reasonable and probable cause. I wish merely to say that I am not at all satisfied that two Plaintiffs under these circumstances could possibly have a joint cause of action, and could maintain the action as co-Plaintiffs.

Lord Hatherley:—

My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friend on the woolsack with regard to the main point in the case.

Happily we are not called upon in this case to decide a difficult point of law, but we have only to decide a question of fact to which the law is to be applied. All the learned Judges appear to agree in saying that if a man being lawfully entitled to possession does place himself in possession, it is not competent for any person by force to attempt to disturb him in that possession which he has so acquired. The only question is whether *Lows*, undoubtedly entitled as he was to the possession, had succeeded anterior to the entry of *Westray* in obtaining the possession of this particular property.

[His Lordship here went into a full statement of the facts, in order to shew that when *Telford* and *Westray* came up and began

H. L. (E.)
1876
Lows
v.
Telford.

their attempt to obtain possession of the place in which their goods were, *Lows* and the men whom he employed were already in actual possession of the premises.]

Nobody could say anything but that *Lows* and those he was employing were at that time in possession of the property, they having gained this possession of the property rightfully in every way, as against *Telford*, although certainly not in a way that one can altogether approve of. I concur entirely with the learned Judges in the Court of Exchequer upon that point. One does not approve of *Lows*' method of obtaining possession, but there *de facto* he was, and being there *de facto* he was also there *de jure*, and he was removed in the fashion described by the witnesses.

I agree with my noble and learned friend in not being surprised that the jury under the circumstances of this case refused to convict the persons indicted for an offence against the statute. At the same time, taking the ground of law, laid down as common ground by all the Judges in both the Courts, when you come to apply the law to the facts of this case, when you find there is possession by persons who have the right of possession, it is impossible to say that there was not a reasonable and probable cause, under the circumstances which took place afterwards, for proceeding under the statute, although that proceeding failed because the jury did not think it right to convict the persons against whom that proceeding was taken. We have only to look at the facts in the case, and it being almost conceded in argument, I think certainly it was conceded by the learned Judges who took the opposite view, that the whole point in the case turns upon whether or not *Lows* had, in fact, obtained the possession he was *de jure* entitled to, I cannot help thinking that it is established that he was in such possession before *Westray* came up, and that the attempt to displace him from the possession justified the indictment.

Lord Selborne:—

My Lords, I entirely agree with the opinions which have been expressed.

The case of *Keech* v. *Hall* (1) established the doctrine that (in

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(1) Doug. 21.

H. L. (E.)
1876
Lows
v.
Telford.

the absence of any contract or conduct to vary the application of the law) a mortgagee having the legal estate may, without any notice to quit, treat the tenant or lessee of the mortgagor as a trespasser or wrongdoer; and that the possession held by the mortgagor or those holding under him, until the mortgagee thinks fit to take it, is in the strictest sense precarious, and held at the mere will of the mortgagee. To such a case, the law laid down by Lord *Coke*, in the passage cited at the Bar from *Coke* upon *Littleton* (1), applies; that "the lessor may by actual entry into the ground determine his will in the absence of the lessee." In 17ChD184 the case also cited at the Bar of *Jones* v. *Chapman* (2), it is accurately stated by Mr. Justice *Maule*, that "as soon as a person is entitled to possession and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser. They differ in no other respects. You cannot say that it is *joint* possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession and the other is a 17ChD185 trespasser." And in *Harvey* v. *Brydges* (3) it is pointed out that so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken by the legal owner forcibly or not.

The law laid down by these authorities was not disputed by the counsel for the Respondents; but they insisted that, although such was the law for all civil purposes, it was nevertheless not applicable to the present case, in which the question is, whether there was reasonable or probable ground for the criminal charge of forcible entry against the Respondents. The question, however, whether there was any reasonable ground for that charge, or not, must necessarily depend upon the state of the legal possession of

(1) 56 b.

(2) 2 Ex. at p. 821.

(3) 14 M. & W. 442.

the *locus in quo* at the time when the acts alleged to constitute the forcible entry were done; and if for civil purposes the legal possession was then in the Appellant, the foundation for such a charge, so far as the state of possession is concerned, was sufficiently and properly established. I am unable to see how it can be denied, consistently with these authorities, that the evidence on this record is sufficient to prove a possession of the *locus in quo* complete in fact and in law by the Appellant, before *Westray* and *Talford* came upon the ground, on the morning of the 14th of July, 1870. He had the legal title; he had (when no one was present to oppose him) effected an actual entry into the premises, beyond all doubt for the purpose of taking possession, and he by himself and his servants had already acquired such a dominion and control over the property, when *Westray* first came upon the ground, that the Respondents could not enter it without putting a ladder against the house and getting in through the window. I cannot doubt that in these circumstances and upon this evidence his possession was legally complete and exclusive; and that it was forcibly disturbed by the Respondents, who knew of the mortgage before they became occupiers under the mortgagor, and whose own evidence shews that they understood their own act to be an attempt not to maintain an existing possession, but to resume a possession which had been displaced.

Judgment of the Court of Exchequer Chamber reversed, and judgment of the Court of Exchequer affirmed, and verdict to be entered for the Defendant below.

Lords' Journals, 11th May, 1876.

Solicitor for the Appellant: *G. Mayor Cooke.*
Solicitors for Respondent: *Phelps & Sidgwick.*

[HOUSE OF LORDS.]

H. L. (E.) EMMA MINORS . . . . APPELLANT;

1876

AND

May 23, 26; June 1. JAMES BATTISON AND OTHERS . . . . RESPONDENTS.

Will—Distribution—"Received"—"Receivable"—"Decide"—Trust or Power—Court—Costs.

12 C.L.D. 639
641, 650,
— 836-7-8
839
13 C.L.D. 579
522
18 C.L.D. 222-5
226
— 636-8

Frederick Hobson the elder, by his will, gave to three trustees (one of whom was his eldest son *William*) all his real and personal property, which included the proprietorship of a newspaper, on trust to carry on the newspaper during the life of his wife, and they were annually to set apart and invest one fourth of the profits of the paper as a reserve fund to meet emergencies, and to divide the remaining three fourth parts of the profits of the same, and the income from his real and personal estate, into six equal parts for his wife and five children (all specially named), and in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children. And, after the decease of his wife, "(or during her life if she and the majority of my children, and my trustees, shall deem it proper and expedient so to do), at the sole discretion of my trustees," to sell the real and personal estate and the newspaper, and divide the proceeds among the wife and children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use and benefit immediately after such division. He declared that, "in case, under the above clause, it shall be agreed, or my trustees shall decide to sell" the paper, and if any of his sons should wish to carry on the same, such one should be entitled to purchase it at £500 less than the market price. Till all the property was sold the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real and personal estate:—

Held, that the will created not a mere power, but a trust, to sell, with a discretion in the trustees as to the manner and particular time of selling; that after the death of the wife the trust to sell became absolute; that on the happening of that event the shares of the survivors became absolutely vested; and (there being but three children of the testator then surviving) that *William Hobson* took an absolute vested interest in an equal third part of the testator's real and personal estate, including the newspaper.

Per LORD O'HAGAN:—The mere fact of the non-sale did not prevent the vesting of the shares.

Observations by LORD SELBORNE on the construction and effect of the divesting clauses in the will.

After trustees have invoked the aid of the Court in administering an estate, and a decree has been made, they cannot act in the matter of the administration except under the sanction of the Court.

An order of the Lords Justices, reversing that of Vice-Chancellor *Hall*, being itself reversed, and that of the Vice-Chancellor restored, the costs of the appeal to the Lords Justices were given to the Appellant, but no costs of the appeal to this House were given. The costs of the trustees were ordered to be paid out of the estate.

THIS was an appeal against a decision of the Lords Justices, which had reversed an order of Vice-Chancellor *Hall*.

Frederick Hobson the elder made his will, dated the 27th day of February, 1857, and after directing the payment of all his just debts and certain specific bequests to his wife, continued as follows:—"I give, devise, and bequeath unto my friends, *James Battison*, *Joseph Buckton*, and my son, *William Hobson*, editor of the *Leeds Times* newspaper, all my messuages or dwelling-houses, lands, hereditaments and premises, whether freehold, copyhold, or leasehold; also all my stock in trade, book and other debts, money and securities for money, proprietorship of the said newspaper, and all other my real and personal estate and effects whatsoever and wheresoever, and of what tenure, nature, or kind soever, not hereinbefore disposed of, to hold to them, their heirs, executors, &c., upon the trusts, &c., hereinafter expressed, that is to say, upon trust to carry on, or cause to be carried on, under their inspection and control, during the life of my said wife, the trade or profession in which I may be engaged at the time of my death, and to use and employ for that purpose such part of my real and personal estate as shall be then used or employed therein, with power for my trustees, out of my real or personal estate or otherwise, to increase or diminish at discretion the real or personal estate so used or employed, and to employ my said son, *William Hobson*, or any of my children, who may be willing and competent to attend to the duties required of them, respectively, in the carrying on of such trade or profession, at such salaries as to my trustee or trustees may appear proper and reasonable, and to remove such children, or any of them, from such employments from time to time as may be thought expedient, and I give to my trustees all the requisite powers for carrying on the said trade or profession as fully and effectually as I could carry on the same if living. I direct my trustees or trustee to cause to be made out in the month of January in every year, or so soon after as practicable, a full and particular account of the said trade or profession and the profits thereof, and to lay the same open to the inspection of my said wife and children. I also direct my trustees to set apart annually, for the purpose of a reserve fund to aid in carrying on, or to meet emergencies or losses arising out of the carrying on, of my said trade or profession, one-fourth part of the profits arising from my trade or profession, and to invest the same from time to time as they shall think proper, and then I direct my trustees or trustee to divide the remaining three-fourth parts of the profits of the said trade or profession, and also the rents, issues, and profits and proceeds of all my other real and personal estates, into six equal parts, and to pay one of such one-sixth part to each of them, my said wife, and children, *William*, *Frederick*, *Fanny*, *Leonard*, and *Mary*, for their absolute use and benefit, and if any of my said children shall happen to die either in my lifetime or in the lifetime of their mother, leaving lawful issue him or her surviving, to pay the share of such child dying equally amongst his or her lawful children. But in case any of my said children shall die in my lifetime, or in the lifetime of their said mother, without leaving lawful issue him or her then surviving, then I direct my said trustees or trustee to divide the income of the share of the child so dying equally amongst the survivors of them, my said wife and children, the share of any deceased child or children who may have died leaving issue being divided equally amongst his or her lawful issue. And in case any of my said children shall survive my said wife, and die before he or she shall have received his or her share of my said trust estate, and without leaving lawful issue, then I give such share equally amongst my surviving children and the lawful issue of any deceased child, such issue taking their, his, or her parents' share only equally amongst them, if more than one. And from and after the decease of my said wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, to sell and absolutely dispose of all my real and personal estates and my trade or profession and the goodwill thereof, and to divide the proceeds thereof among my said wife and children, and their lawful issue, if the division be made in the lifetime of my said wife, but if the division be made after her death, then amongst my children and their lawful issue only, in the same manner and in the same proportions as I have hereinbefore directed the income or profits of the said real and personal estate to be divided, and in such division I request my trustees or trustee to bring into the account the moneys set apart or the portion remaining set apart from my trade or profession as aforesaid. And I hereby declare my will to be that the shares of my sons (and of my said wife if the trust fund be divided in her lifetime) shall be for their absolute use and benefit immediately after such division, but the shares of each of my daughters shall be invested by my trustees or trustee in such way as they may think proper, and the income thereof be paid to each of my daughters during her life for her separate use and benefit without any power of anticipation, on her receipt alone, and after the decease of each of my said daughters I give and bequeath the principal of her share equally amongst her lawful children, their executors, administrators and assigns absolutely. I hereby farther declare my will to be that in case under the clause hereinbefore contained it shall be agreed, or my trustees shall decide, to sell my stock-in-trade and proprietorship of the *Leeds Times* newspaper, and my sons or any of them shall, by writing, offer to purchase and to carry on the same, the trustees or trustee of my will may, and they are hereby authorized and requested to sell the same to them, my said son or sons, at the sum of £500 less than the market price of such trade or profession, such market price to be assessed by the valuation of some competent person or persons. And I farther declare my will to be that until all my said real and personal estates shall be sold and converted into money, the trustees or trustee shall apply the income of such part thereof as shall for the time being remain unsold or unconverted, after payment thereout of all rates, taxes, assessments, expenses of repairs, insurance and other outgoings, to the person or persons for the purposes and in the manner hereinbefore expressed as to the proceeds and income of my real and personal estate."

The testator appointed his wife, and the three trustees, *Battison, Buckton*, and *William Hobson*, to be executrix and executors of his will. The testator died on the 1st of April, 1863, and the three trustees and executors proved the will. In 1866 a bill was filed by two of the trustees, *Battison* and *Buckton*, against *Mary Hobson*, the widow, and *William Hobson* the third trustee, and others interested under the will, for an administration of the trusts, and praying for an inquiry whether the newspaper should be continued or should be sold with the approbation of the Court. Upon this bill Vice-Chancellor *Stuart* declared it to be for the benefit of all interested that the paper should be carried on.

Two children died in the lifetime of the wife without issue.

After the death of the widow in April, 1870, *Buckton* presented a petition that all the unsold real and personal property and the newspaper should be sold under the direction of the Court. Vice-Chancellor *Stuart* thought the direction to sell after the decease of the widow was a power to be exercised at the discretion of the trustees, and not a trust, and was also of opinion that it was for the benefit of all interested that the paper should be carried on, and so directed that a scheme should be framed for that purpose. *William Hobson* appealed against this decision to the Lords Justices, by whom his appeal was dismissed with costs.

The case came before Vice-Chancellor *Wickens* in July, 1871, who, in substance, made an order carrying into effect the former orders.

The newspaper was, under these orders, carried on until the time of the death of *William Hobson* on the 11th of January, 1872. The cause then came on for farther consideration, and was heard before Vice-Chancellor *Hall*, who made an order on the 17th of February, 1874, declaring that *Emma Minors* (the personal representative of *William Hobson*) and two other persons, *Fanny Metcalfe* and *Mary Buckley*, two surviving daughters of testator, married, and having children, were entitled in equal shares to the income of the real and personal estate of the testator accrued since *William Hobson's* death, and that for the purposes of distribution the estate ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. The Lords Justices, on appeal, upon the 7th of July, 1874, reversed this decision of Vice-Chancellor *Hall*, holding that the previous orders in the cause had really disposed of it, and that there was not an absolute trust to sell, but only a power to sell at the absolute discretion of the trustees.

This was an appeal against that decision.

Mr. *E. K. Karslake,*, Q.C., and Mr. *Ford North,* were for the Appellant.

Mr. *Dickinson,* Q.C., Mr. *De Gex,* Q.C., Mr. *W. Joyce,* Mr. *W. Brodrick,* Mr. *J. W. Dunning,* Mr. *F. Clarke,* and Mr. *Pattison,* for the various Respondents.

On the construction of the will and the duty of the trustees, *Hutchin* v. *Mannington* (1), *Elwin* v. *Elwin* (2), *Arrowsmith's Trusts* (3), *Holmes* v. *Godson* (4), *Martin* v. *Martin* (5), *In re Phène's Trusts* (6), *Fordyce* v. *Brydges* (7), *Walker* v. *Walker* (8), *Newman* v. *Warner* (9), *Sugden* on Powers (10), *Varlo* v. *Faden* (11), *Harrington* v. *Atherton* (12), *Sparling* v. *Parker* (13), and *Mackie* v. *Mackie* (14), were cited and commented on. On the question whether, after the institution of a suit and the making of a decree, the trustees had any power to act without the direction of the Court, *Webb* v. *Shaftesbury* (15), *Widdowson* v. *Duck* (16), *Bethell* v. *Abraham* (17), *Lewin* on Trusts (18), and *Simpson* on Infancy (19), were also cited.

LORD CHELMSFORD:—

My Lords, the question to be determined in this appeal is whether, upon the true construction of the will of *Frederick Hobson,* the Appellant, *Emma Minors,* as the representative of *William Hobson,* is entitled to one-third share of the part of the testator's residuary estate which consists of the proprietorship of the *Leeds Times* newspaper, and of a fund called the Reserved Fund connected with it.

The manner in which the will is drawn presents some difficulty in construing it satisfactorily. The testator gives all his real and personal estate under various descriptions, including the proprietorship of the newspaper, to trustees upon trust during the life of his wife, to carry on the newspaper (which he calls the trade or profession in which he is engaged), and to use and employ for that purpose such part of his real and personal estate as shall be then used and employed therein, with power at their discretion to increase or diminish the estate so employed. He then directs his trustees to set apart annually one-fourth of the profits of the trade or profession as a reserve fund to aid in carrying it on, or to meet emergencies or losses, and to divide the remaining three-fourths of the profits and also the rents, issues, profits, and proceeds of all his other real and personal estate into six parts, and to pay one-sixth to each of them, his wife and five children, or to the children of any of them who shall die in the lifetime of the wife, and if any shall so die without issue, to divide the income of the share amongst the wife and the surviving children.

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(1) 1 Ves. Jun. 366.
(2) 8 Ves. 547.
(3) 2 De G. F. & J. 474. 7 Jur. N.S. 9
(4) 8 De G. M. & G. 152. 2 Jur. N.S. 285
(5) Law Rep. 2 Eq. 404. 12 Jur. N.S. 809
(6) Law Rep. 5 Eq. 346.
(7) 2 Phil. 497.
(8) 5 Mad. 424.
(9) 1 Sim. (N.S.) 457.
(10) Pages 129, 888.
(11) 27 Beav. 255; affirmed 1 De G. F. & J. 211. 5 Jur. N.S. 1195. 6 do. 257
(12) 2 De G. J. & S. 352. 10 Jur. N.S. 766, 1068.
(13) 9 Beav. 525.
(14) 5 Hare, 70.
(15) 7 Ves. 480.
(16) 2 Mer. 494.
(17) Law Rep. 17 Eq. 24.
(18) Pages 393, 497, 515.
(19) Page 255.

Then follows the clause upon which the question mainly depends (and which is rather out of place), in these terms: "In case any of my children shall survive my wife and die before he shall have received his share of my trust estate without leaving issue, I give such share equally amongst my surviving children." This clause is followed by one which ought to have preceded it: "And from and after the decease of my wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees or trustee, to sell and absolutely dispose of all my real and personal estates and my trade or profession, and the goodwill thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Upon these two clauses the question arises whether the directions with regard to the sale of the testator's real and personal estate and his trade or profession, give to the trustees a mere power, to be exercised or not at their discretion, or is an absolute trust for sale, their discretion not applying to the sale itself, but only to the manner of effecting it.

The question of the construction of the will has come before the Courts at different times, but only, as it were, by piecemeal. In 1866 a bill was filed by two of the trustees, *Battison* and *Buckton*, against *Mary Hobson*, the widow, and *William Hobson*, the third trustee, and others interested under the will, for an administration of the trusts of the will, and praying for an inquiry whether it is fit and proper, and for the benefit of all parties, that the trade or business of a newspaper proprietor should be carried on and continued; and if it shall appear not to be fit and proper, that the stock in trade, goodwill, and proprietorship of the newspaper, be sold, with the approbation of the Judge. Upon this bill in 1866 Vice-Chancellor *Stuart* made an order declaring it to be fit and proper, and for the benefit of all parties interested who are not *sui juris*, that the newspaper should be carried on. I do not comprehend how this inquiry came to be directed, and the order of the Vice-Chancellor made; because during the life of the testator's widow, the newspaper is directed to be carried on and continued unless she and the majority of the children and the trustees think it fit and expedient that it should be sold.

After the death of the testator's widow, *Buckton*, one of the trustees, on the 8th of July, 1870, presented a petition praying, amongst other things, that the unsold real and personal estate of the testator, including the proprietorship of the newspaper and the goodwill of the trade or business, should be sold by and under the direction of the Court. Vice-Chancellor *Stuart*, on the 24th of November, 1870, made an order that, being of opinion that the directions contained in the will as to a sale and disposition of all the testator's real and personal estate, and his trade or profession, and the goodwill thereof, after the decease of his wife, *Mary Hobson*, at the sole discretion of his trustees or trustee, is a power enabling such trustees or trustee to sell and dispose of the same, and is not to be construed or held as an absolute trust for the sale and disposition thereof on the happening of such event, and being also of opinion that it is for the benefit of all persons interested that the business of the *Leeds Times*, and the real estate of the testator, should not at the present time be sold, but that the business should be continued and carried on until farther order, a scheme should be settled for carrying it on. I will not here advert to the opinion of the Vice-Chancellor as to the trustees having a power and not a trust, but I must remark upon his opinion that it was for the benefit of all persons interested that the business of the *Leeds Times* should be continued and carried on, when it was stated, in the petition itself, that *William Hobson* claimed to be entitled under the will to purchase the stock in trade and proprietorship of the *Leeds Times* newspaper at the sum of £500 less than the market price thereof. *William Hobson* appealed by petition from this order, but the Lords Justices by an order of the 3rd of May, 1871, dismissed his petition.

The newspaper continued to be carried on under these orders, and under a farther order of Vice-Chancellor *Wickens* of the 18th of July, 1871, down to the time of the death of *William Hobson* on the 11th of January, 1872. After *William Hobson's* death the cause came on for farther consideration, to determine the rights of all parties, before Vice-Chancellor *Hall*, who, by an order of the 17th February, 1874, declared that the Appellant, *Emma Minors* (who had become the personal representative of *William Hobson*), *Fanny Metcalfe*, and *Mary Buckley*, were entitled in equal shares to the rents and income of the testator's real and personal estate accrued since the death of *William Hobson*, including as part of such income three-fourths of the profits of the testator's business, until the sale and conversion thereof; and that for the purposes of distribution the testator's estate, including his business of the *Leeds Times* newspaper, ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow. Upon appeal from this order the Lords Justices reversed the decision of Vice-Chancellor *Hall*, being of opinion that the point was really decided for all purposes by the former decision of the Court which affirmed the decision of Vice-Chancellor *Stuart*. And they held that there *was not an absolute trust to sell* on the death of the widow, *but* simply *a power to sell* at the discretion of the trustees, "an absolute discretion" as Lord Justice *James* said, "extending beyond the death of the wife, and extending, apparently until there would be some person or persons entitled absolutely to say, 'We will have nothing more to do with the trust, and we claim the property ourselves.'"

It is to be regretted that the Lords Justices should have thought the question settled by their former decision, as it probably prevented a more close and careful consideration of the case, which might possibly have led them to a different conclusion. For, after a repeated examination of the will, I am unable to acquiesce in their judgment. It appears to me that with regard to the business of the newspaper (the principal subject in the mind of the testator), he contemplated its being carried on and continued during the life of his wife, except in the event of the wife, the majority of the children, and the trustees, agreeing to sell it, and that upon the decease of the wife, it should absolutely be sold. It is observable that the direction to use and employ the real and personal estate in the business applies only to its being carried on during the wife's life; and the creation of the reserve fund is confined to the same period. The trustees are directed, while the business is being thus carried on, to divide the profits of the trade or profession, and also the rents, issues, and profits, and proceeds of all his other real and personal estate, amongst the wife and children. This direction appears to me to give the wife and children, not a share of the profits merely, but an absolute share in the business itself, and in the real and personal estate. If that be so, Vice-Chancellor *Hall* was incorrect in holding that for the purposes of distribution the testator's estate ought to be considered as sold and converted at the expiration of twelve months from the death of the widow, so as to entitle *William Hobson* to his share of the trust estate under the clause providing for the case of children surviving the wife, and dying before they had received their share; because before the death of the wife *William Hobson's* share was vested in him, and was (to use Lord Justice *James's* words) "*de jure* receivable." If, as I have said, *William Hobson's* share was vested at the time of the wife's decease, the clause as to children receiving their share can only be regarded as a divesting clause, and is either repugnant, as after vesting a share could not be divested, or it must mean, not before actually receiving it, but before becoming entitled to receive it.

Lord Justice *Mellish* is of opinion that if, according to the true construction of the will, there was an absolute trust to sell on the death of the widow, this would be the meaning of the word "received." Now that there was such a trust created, and not an absolute discretion in the trustees, as held by the Lords Justices, appears to my mind (I will not say clear, after their opinions), but to be the better construction of the clause for sale, and to be recommended by the consequences which would follow from the adoption of the view of it taken by the Lords Justices. An absolute discretion in the trustees to sell whenever they thought proper, would, as Vice-Chancellor *Hall* said, "prolong indefinitely the ascertainment of the persons to be beneficially interested in the property by an undefined and indefinite continuance of the business," and would thus place in the absolute power of the trustees the interests of all the children, and their issue, given them by the will. Such a construction of the clause ought not to be adopted if it is capable of a more reasonable one. In my opinion the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage.

The counsel for the Respondents argued in favour of the absolute discretion of the trustees by referring to the clause declaring that in case it shall be agreed, or the trustees shall *decide* to sell, they are authorized to sell to the sons at £500 less than the market price. This clause seems to be inserted in the will for the benefit of the sons, and the word "*decide*" was perhaps inadvertently used. But the moment it is ascertained that an absolute trust for sale is created, all nice criticisms as to the meaning of the words "received" and "decide" fall to the ground.

I cannot help observing, though perhaps it is unnecessary, that even assuming the Lords Justices' opinion, that the trustees had an absolute discretion, to be correct, yet this would not prevent the Appellant from being entitled to her share of the testator's residuary estate as the representative of *William Hobson*—because, during the life of *William Hobson* the trustees had retired from the trust and placed themselves in the hands of the Court by the bill filed by the trustees for administration of the trusts and the order founded thereon, after which the trustees could not exercise any discretion with which they were invested without the sanction of the Court. Therefore as the business could no longer be carried on by the trustees, the period must at all events have arrived when the persons interested were entitled to their shares in the business and in the real and personal estate of the testator.

I submit to your Lordships that this appeal ought to be allowed, and that the case ought to be disposed of in the manner which I believe your Lordships have agreed upon.

LORD HATHERLEY:—

My Lords, I concur in the interpretation which has been put upon this will by my noble and learned friend who has just addressed the House. I think if we make allowance for certain difficulties introduced by the testator's throwing in parenthetical expressions in scarcely the fit place for their insertion, the interpretation of the will is really of the simplest character. There is a plain and express devise of the whole of the testator's property, including the *Leeds Times* newspaper (with the exception of certain chattels which are given to his wife individually) to three trustees named in the will, Mr. *James Battison,* Mr. *Joseph Buckton,* and the testator's son, *William Hobson,* who at that time, it appears, was editor of the newspaper. The testator gives all his real and personal estate and effects whatsoever to those trustees "upon trust to carry on, or cause to be carried on under their inspection and control, during the life of my said wife, the trade or profession in which I may be engaged at the time of my death." He then gives directions as to what they are to do during that period. The trustees are to have "all the requisite powers for carrying on the said trade or profession as fully and effectually as I could carry on the same if living." He directs accounts to be made out in the proper manner, and he gives them the power of applying the real and personal estates towards the carrying on of the business, and directs the setting apart of a fourth of the profits of the business for the purpose of creating a reserve fund to provide for any particular emergencies occurring during the time during which he has directed the business to be carried on; and that time is limited to the life of his wife in the first instance.

Then he disposes of the income arising from this arrangement, by making a somewhat unusual disposition, but one which it is not at all difficult to understand in this case.

There is a trust to carry on the business during the wife's life and a trust to sell at her death. And your Lordships will observe that this is the only place where we find any trust at all to sell any part of the property, including this business; and farther, after what I have already referred to in the will, there is no direction giving the trustees full powers for carrying on the business after the wife's death as they could carry it on before; there is no direction for their setting aside a fourth part of the profits after that time as they were to do before, and there is no direction about applying the income of the general estate, the real and personal estate, towards the carrying on of the business. Possibly if the construction of the whole will had forced the Court upon such a construction, all that might have been held to be implied after the death of the wife as it had been directed during the wife's lifetime. That would have been a strong conclusion that the business was to be carried on in a certain event after her death. But in the absence of any expressions leading us to that strong conclusion, the observation seems to me to have great weight, as leading us to what is the real interpretation of the will, and tending to shew that he did not contemplate the business going on for any length of time after the wife's death. That what he does direct in a parenthesis which I left out is this: "From and after the decease of my wife"—then comes the parenthesis—"or during her life if she and the majority of my children and my trustees shall think it proper and expedient so to do."

Now, my Lords, observe what happens there. Having given his wife only a life interest in her share, because there is no portion of the *corpus* given to her or her representatives absolutely, she does not take in any sense absolutely, but after her death her representatives lose the income derived from the estate, and the whole bulk of the property goes to be sold and divided among the children; having done that, it occurs to the testator as possible, that during his wife's lifetime a sale may be desirable, and he makes a provision for it which I think is of some importance with reference to the subsequent discretion of the trustees. He says, If that is done in my wife's lifetime, I notice that her position under the previous part of the will will necessarily be changed, because then she will come in for a portion of the *corpus* together with the children, instead of having solely a life interest. That being the case, he thinks it desirable that it should not be either the wife's sole voice or the sole voice of the children, or the sole voice of the trustees, which should determine that such a change of interest as that should take place. Therefore, he says, if it is sold in her lifetime it must be done by the voice of the majority of his children and his trustees, if they think proper and expedient so to do.

Now, there is no direction about the majority of the children, and the trustees after the death of the wife. Your Lordships will observe, if the Respondents' contention be true, what a position the trustees are placed in with reference to the interests of the children. If the trustees are to have an absolute discretion, unfettered by any majority of the voices of the children, and unfettered by any direction on the testator's part, it is left to them to say whether or not they will continue the business, the position of the family being this: two children having died without issue, and having died in the lifetime of the wife, their shares have passed over. *William Hobson* has no children, his two surviving sisters, I think, have children, so that their shares will pass over to their children, whilst, according to the construction of the Respondents, his would be forfeited; that is to say, limited and confined to his own life and afterwards pass over to them; and moreover, *William Hobson* has an interest if the business is sold to the extent of £500 in value, because he was to be allowed to buy it at £500 less than the market price. He being placed therefore in a position in which his interests were extremely antagonistic, as far as pecuniary interests went, to the interests of his brothers and sister, would be left to be dealt with by the trustees to this very considerable extent, at their discretion solely, without any regard to the claims that he might have to have the property so managed that he should not lose the benefit of those interests which were, in the first instance, obviously contemplated for him by the will.

These considerations would lead one to think it was a very difficult conclusion to arrive at, to hold that the trustees could postpone the sale to an unlimited period, to any period up to *William Hobson's* death, and then direct a sale without giving him an opportunity of making the purchase for the £500 less than the market price, and in the absence of any issue on his part to whom the share, which he would lose by death anterior to the sale, should pass over for the benefit of his family. On the other hand, as I read it at first, leaving out the parenthesis, it seems to me as plain and simple a trust as possible for a sale to be made, and it contains an expression which is not at all unusual, leaving a certain liberty to the trustees as to the mode of dealing with the estate, especially as it consists in part of a newspaper requiring some considerable extent of management in the proper disposition and sale of it. That is left to the discretion of the trustees, but it is not left to their discretion whether they shall sell or not. It is a trust that they shall sell, but when they do sell, fault is not to be found with them because they have sold at a later period than others might have thought beneficial, if they have acted with proper and reasonable discretion.

The word "decide" occurring later in the will, I think, means nothing more than that—Having said, if a sale takes place during my wife's life there must be a form gone through, and more than a form, a resolution come to by the majority of my children and the trustees in this matter, to all of whom I give a voice; he then says, if it takes place after her death it is to be at the discretion of the trustees. Whether it be in the wife's lifetime, or whether it be after her death, they must decide what is the right moment, in their reasonable discretion, for the sale which they must effect in a reasonable time, especially having regard to the circumstances I have mentioned as to the interest of parties, the testator having said: "When the time for the sale has come, whether it is at one period or the other, I mean *William Hobson* to have £500."

That, my Lords, seems to me a strong expression of intention on the testator's part that whenever the sale takes place his son is to have that benefit. But I cannot understand it to imply anything giving to the trustees that wide discretion which appears to have been thought by the Court below vested in them. Still less can I come to the conclusion to which Vice-Chancellor *Stuart* came, and in which he was afterwards confirmed by the Lords Justices, that this was not a trust, but a power for sale. I hold, on the contrary, that it is a distinct trust for sale. Nothing is

H. L. (E.)
1876
MINORS
v.
BATTISON.

left to the trustees but that discretion in the mode of dealing with it which must be reasonably expected in the conduct of trustees who are anxious to perform their duty. Supposing that this is not a power, but a discretion in the sense in which I use the word, then it is possible that you might apply the doctrine of *In re Arrowsmith's Trusts* (1), and consider that it was in this case a reasonable time for the sale; or you might, following other cases, say that in regard to the expression "children dying before the period of division" you cannot hold that to be an unlimited period; and that the reasonable discretion of the trustees cannot be prolonged to an indefinite time, especially having regard to that £500 clause which I referred to; I should be disposed to hold that it came within one or other of those views.

But what seems to make the whole matter clear as regards the trustees is this. Almost immediately after the death of the wife, *Buckton*, one of the three trustees, presented a petition to the Court, in which he sets forth a desire expressed by the *cestuis que trust* other than *William Hobson* (shewing there a somewhat antithetical interest as opposed to *William Hobson*) and one of the trustees *Battison*, that he (*Buckton*) should retire from this trust; and he prays for a sale, and asks for a direction by the Court as to what is his proper course to pursue. Now, we must bear in mind that anterior to this petition there had been, during the lifetime of the wife, an order by Vice-Chancellor *Stuart* directing an inquiry whether it was for the benefit of all parties that the business should be continued or not, instead of taking the course of the majority of the children and the trustees deciding on that point.

That was in the lifetime of the wife, and there was a finding upon that, and now Mr. *Buckton*, the wife being dead, prays for a sale. *William Hobson*—as of course was shewn by his subsequent petition of appeal—was also desirous that there should be a sale. There were, therefore, two out of the three trustees desirous that a sale should then and there take place. The Court then again inquired as to whether it would be for the benefit of all parties that a sale should then and there take place.

What does that mean? It does not mean that the Court wished

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(1) 2 De G. F. & J. 474. 7 Jur. N.S. 9.

H. L. (E.)
1876
MINORS
v.
BATTISON.

to alter the rights of all the parties who might have acquired vested interests by the death of the widow, and the indefinite postponement of the sale during which those rights and interests would be seriously affected; but it means merely this, that taking the rights and interests of all parties under the will as remaining unaffected by the inquiry what is best for their benefit, their rights will remain exactly as they were before that inquiry was made, or before that inquiry was acted upon, and their rights will have to be determined by the true construction of the will. It seems rather a strange view that it was for the benefit of all the parties—*William Hobson's* estate and interests being considered. However, assuming that the Court was right in coming to the conclusion that it was for the benefit of all parties, it appears to me quite clearly that that inquiry would make no difference whatever in the construction we ought to put upon the rights which accrue to all parties under the will, whatever arrangement may have been made by the Court for the sake of the convenience of the estate.

I think, my Lords, that that is the view we ought to take of an inquiry of that kind directed by the Court; and having come to the conclusion that *William Hobson* did certainly, notwithstanding the clause about children dying before the period of division, acquire an interest, if not before that period, according to the view adopted in the case of *Arrowsmith's Trusts* (1), at least after the presentation of the petition, when he and *Buckton* desired that a sale should take place. I see nothing at all that can be held upon the face of this will to displace that interest, and therefore it seems to me that the decision which has been come to by Vice-Chancellor *Stuart* in the first instance, and by the Lords Justices affirming his, cannot be a right conclusion.

It is a very singular circumstance in this case that a different view should have been come to with regard to the other parts of the testator's property. He has put them all, evidently, into one fund during the lifetime of his widow; the whole estate is to be applied for carrying on the business; he has, after the death of the widow, directed a sale of the property, both real and personal, using the expression, of course, at the discretion of the trustees;

(1) 2 De G. F. & J. 474. 7 Jur N.S. 9.

H. L. (E.)
1876
MINORS
v.
BATTISON.

and it does seem to me a very singular construction which would sever one part of this property from the other, so that one fund would be dealt with by one division, and another by another. The result of the decision already come to is this, that a separate inquiry seems to have been necessary with regard to the various portions of the testator's property, and a very different result is applied to one class of the property from that which is applied to the other, although the whole appears in the will to be given over to one class, and to be intended to be divided as for one class.

I cannot think, my Lords, that any such conclusion could have been arrived at had it not been for the unfortunate course which this case has taken. It has been brought before the Court in half-a-dozen different ways at half-a-dozen different times, under varying circumstances, and the Court has never had a clear exposition of the whole will to fasten its judgment upon; but it has been asked to pronounce first on one point and then on another, until in the end the whole general scope of the testator's will seems to me, with great respect to the Lords Justices, to have been lost sight of.

LORD O'HAGAN :—

My Lords, although I concur, I cannot say that I concur undoubtingly in the conclusion of my noble and learned friends. This case has been considered by three Vice-Chancellors and two Lords Justices, and their views of it have been conflicting. It was presented to them in various aspects and in isolated portions. It has not been reported, and the notes of the observations of the learned Judges which we possess (1) are partial and imperfect. The first judgment of the Lords Justices seems to me, from the observations of Vice-Chancellor *Hall*, to have impressed that learned Judge (who had been, when at the Bar, counsel before them in these cases) as conveying an opinion on the main matter before us different from that which their second judgment (professing to found itself on their first) indicates as having been expressed in the earlier one. But, however this may have been, the question is one of those in which we are bound to seek the

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(1) In the printed Appendix to the Cases.

H. L. (E.)
1876
MINORS
v.
BATTISON.

true construction of a document, in the absence of the means of determining it with absolute certainty, by the exercise of common sense, applied to language in its ordinary meaning, and to the circumstances of each particular case, and with such light as may be gained from legal principles in ascertaining the probable intention of a testator. Endeavouring in this way to interpret a difficult will, I concur in the proposed resolution.

12 Ch D 651,

It is to be noted, that the literal meaning of the words we have to construe is not insisted on. The provision that if any of the children shall die "before he or she shall have received his or her share" of the trust estate is not interpreted, in the judgment under appeal, as if it meant to point to an actual receipt of the share, as in the case of *Martin* v. *Martin* (1), which is very different from that before us. The word "received" is held by the Lords Justices, and rightly held, to have the meaning of "*de facto* received or *de jure* receivable." And if such an interpretation be admissible, the only question really is, at what time were the shares *de jure* receivable? If they were receivable at the death of the widow, or within twelve months afterwards, *cadit quæstio*. The fact of the non-receipt becomes immaterial, and the judgment of the Vice-Chancellor is sustained.

It seems to me, obscure as the phraseology is, that it sufficiently indicates, according to the view of Vice-Chancellor *Hall*, the creation of a trust—and not the creation of a power—to sell "all the real and personal estates, and the trade or profession" of the testator, accompanied by a "discretion" in the trustees as to the time and manner of the selling; and I think that the word "decide" in a subsequent part of the will may fairly be taken to point, not to a capricious or unlimited capacity of action or postponement, but to the exercise of that "discretion" in fixing judiciously the period for the fulfilment of the trust to sell. And I do not conceive that the mere fact of the non-sale up to the present time prevents the vesting of the shares. I quite agree that if the testator had unequivocally expressed a contrary intention it would have been our duty to carry it into effect. But, as the matter stands, I think we are driven to consider his whole will in relation to the circumstances with which he was dealing; and so considering it, I do not

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(1) Law Rep. 2 Eq. 404.

H. L. (E.)
1876
MINORS
v.
BATTISON.

feel obliged to attribute to him the design to make an indefinite postponement of the sale; to keep his legatees in doubt and uncertainty, perhaps for all their lives; to give to his trustees, or to a single one of them, the power to nullify his bequests at their or his absolute pleasure; or to prevent the ascertainment of the beneficiaries really to take, whilst trustee might succeed trustee in a lengthened series. It may be that an absolute intestacy might not be, according to the view of the Respondents, as was suggested by Mr. *Karslake*, actually occasioned, but that view would make possible and probable such a delay of vesting, to the prejudice and confusion of the legatees and their families, as, in my opinion, the law should not, and will not, countenance without coercive reason.

The cases of *Hutchin* v. *Mannington* (1) and *Elwin* v. *Elwin* (2) certainly sustain the conclusion at which I have arrived. In the former, the gift over was defeated, because the purpose was, in the words of the Lord Chancellor, "immeasurable;" because it was "all too uncertain." The uncertainty and difficulty of ascertaining the intent which operated in that case exist, also, in the case before us. In the latter, a different rule was reached, because the intention was declared with a "definite certainty," which does not here compel us to an injurious decision.

12 CL D 65

To justify this reasonable view, I do not think it necessary to strike any words out of the will (which the Lords Justices seem to have thought would be necessary) or to depart farther from its verbal effect, or give it any more flexibility, than is involved in the alternative meaning attributed to the word "received" by the Lords Justices and accepted at the Bar. Besides, it seems to me that the will contains indications of the testator's intention with reference to the newspaper property which persuasively support the construction of the Vice-Chancellor. The "discretion" given to the trustees is not to carry on the business, but "to sell and absolutely dispose of all my real and personal estates and my trade and profession and the goodwill thereof." These words put the real and personal estate and the trade of the journalist on precisely the same footing, and indicate that all should be dealt with in the same way. If the "real and personal estate" only had

(1) 1 Ves. Jun. 366.

(2) 8 Ves. 547.

been mentioned, I apprehend that there could have been little controversy as to the existence of a trust to sell, and that the observations of the Lord Chancellor *Thurlow* in *Hutchin* v. *Mannington* (1) would have had clear application: "When there is a trust that is always considered to be done which is ordered to be done." And again: "If the testator had given a real estate in the same way, it would not depend on the trustee to sell, nor upon his dilatoriness."

Pressed by this consideration, the Respondents vigorously contended that the testator had in view a distinction between his business and his real and personal estate, and desired that they should be dealt with in different ways; and it was suggested that, even if the Lords Justices were wrong as to the freehold and personal property, they were right as to the newspaper. But I cannot discover this difference in the terms of the will or the reason of the thing. True it is, as was ably urged, that the business might, from its peculiar nature, require a different exercise of discretion from that needed for the freehold or the personalty; and these again might require such a difference of that exercise as between themselves. But I am not satisfied that there was any such distinction in the mind of the testator with reference to the disposal of his various possessions after his death as would warrant a dealing with them, for the purposes of this case, on different principles.

It was urged by Mr. *Dickinson* that the prevailing idea of the will regarded the continuance of the newspaper, and his inference thence would seem to lead to the justification of the indefinite postponement of the sale, involving unlimited delay in the settlement of the rights of the parties and the ascertainment of the beneficiaries entitled to take advantage of them. But that the testator had no such view of splitting up his property, when the time of distribution should arrive, seems intimated not only by the identical treatment of the "real and personal property and the business," to which I have already adverted, but by the marked distinction, so forcibly put by Mr. *North*, between the provisions affecting the newspaper during the life of the testator's wife and after her decease. As to the business, the trustees are to carry it

(1) 1 Ves. Jun. at p. 367.

on during the life of the wife. During her life, accounts are to be rendered and distributions made; during her life the newspaper is to be maintained by advances of money, and during her life a reserve fund is to be created. In the face of these arrangements, it is impossible to say that the business was not to be continued during the life of the wife. But after her death, there is to be an end of all this complicated machinery. Thenceforward, there is no provision for carrying on the business, or making a reserve fund, or advancing money to carry on the concern. The single provision is for the sale of all the testator's property, the freehold, the personalty, and the newspaper alike, and for the distribution of the proceeds. May not this manifest distinction fairly be taken to imply a difference in the testator's purpose with respect to the business during the life and after the death of his wife, and a design that it should cease to be carried on and absolutely sold, like his other property, at the earliest moment when his trustees, in their discretion, should be able to dispose of it to reasonable advantage? The Respondents appear to me to have failed in their attempt to escape the effect of the uncertainty involved in their construction, or to shew that the testator meant his business after his wife's death to be dealt with differently from his freehold and personalty. The clause as to the right of pre-emption in any of his sons only regulates the price to be received when the sale should be resolved on, but not at all the period at which that sale should take place.

On this view of the case I am content to rest my judgment; but it is well sustained, also, by a consideration of the effect of the difference between the trustees, the invocation of the powers of the Court, and its active intervention, which, with their legal consequences, were properly pressed on the attention of the House. Holding, however, the reasons I have given sufficient and satisfactory, I do not wish to occupy time unnecessarily, and, for those reasons, I express my concurrence with the noble and learned Lords who have preceded me.

LORD SELBORNE:—

My Lords, the respect which I feel for every opinion of the Lords Justices had induced me to commit to writing the reasons of the opinion which I have formed as to the construction of this will at some length; but, after what has been stated by the noble and learned Lords who have preceded me, I think it sufficient to state shortly, as to several points in the case, the conclusions only at which I have arrived, and as to which I must confess I have felt no doubt or difficulty from the commencement of the argument.

First, then, I think that the declaration contained in the order of Vice-Chancellor *Stuart* of the 24th of November, 1870, was erroneous, and ought not to have been made. Whatever might be the true construction of the will on the point dealt with by that declaration, the Court had full power, on the hearing of the petition then before it, to postpone a sale of the newspaper business and of the real estate of the testator, if it appeared (as it did) to be for the benefit of all parties interested so to do; although one of the *cestuis que trust, William Hobson* (who, besides his interest under the will, had an option to purchase) asked for an immediate sale.

Secondly, I am of opinion that there was under this will an absolute and imperative trust for sale, taking effect from, and immediately after, the death of the widow; although with a discretion both as to the manner and as to the time of sale, which discretion was, in my opinion, to be reasonably exercised by the trustees for the purpose of executing, and not of defeating, that trust for sale.

Next, I am very clearly of opinion, that there was, under this will, one, and only one period, at which the *corpus* of the testator's estate, directed by him to be sold, became *de jure* distributable; that period being the time of the widow's death.

The counsel for the Respondents relied much upon the words (in the clause giving the sons an option to purchase the newspaper) "in case, under the clause hereinbefore contained, it shall be agreed, or my trustees or trustee shall decide, to sell my stock-in-trade and proprietorship of the *Leeds Times* newspaper, and my sons, or any of them, shall by writing offer to purchase," &c. These words, it was argued, prove that there was to be no sale of the newspaper unless the trustees should so decide. I am not of that opinion. So far as those words contemplate an event contingent, and not certain, it is to be observed that the event so spoken of is a complex one, not simply a decision by the trustees

H. L. (E.)
1876
MINORS
v.
BATTISON.

to sell, but (together with that) an offer by one or more of the sons to purchase. This complex event might never happen, although the trustees might not only be bound to sell, but might actually sell, the newspaper. The trustees having a reasonable discretion to exercise as to the time of sale, there could be no actual sale till they decided to sell, although the trust was absolute; and these words, from their association with the alternative of a sale by agreement, are used as descriptive only of a sale after the widow's death (when the time of selling would depend on the sole discretion of the trustees), as compared with a sale in the widow's lifetime, when it would also depend upon the consent of other persons. This clause gives no new or separate power at all as to the newspaper property, it simply refers to a sale "under the clause hereinbefore contained." If it could be held to reduce the preceding clause, so far as relates to the newspaper property, from a trust to a mere power of sale, it must have the same effect with respect to all the rest of the testator's real and personal estate. Any such inference from such words seems to me not only unnecessary but altogether unreasonable.

In a later clause the testator directs that until all his real and personal estates should be sold and converted into money the trustees should pay to the *cestuis que trust* the income of such part thereof as should for the time being remain unsold or unconverted. This shews clearly enough that the testator fully understood that in the course of the execution of the trusts of the will it might be found necessary or convenient to sell different parts of his property at different times, and that he intended to provide for that case. But it confirms rather than otherwise the conclusion that (subject to the exercise of a reasonable discretion as to time) he intended everything to be sold.

These points being ascertained, we are brought to the consideration of the divesting clause, introduced by these words: "And in case any of my said children shall survive my said wife, and die before he or she shall have received his or her share of my said trust estate," &c. These words, in their *primâ facie* natural sense (from which there is nothing in the context to authorize any departure), relate to the death of a child during the interval between the death of the widow and the time when that child's share might be actually received, or at least *de jure* re-

12 Ch D 65

18 Ch D 222
225
— 638

ceivable. It was decided, in *Hutchin* v. *Mannington* (1) and *Martin* v. *Martin* (2), that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord *Thurlow* said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell; that in some way the property *might* be sold immediately; that the Court would not inquire when a real estate might have been sold with all possible diligence, but always in such a case considered it as sold the moment the testator was dead (there the trust for sale came into operation on the death of the testator); that where there is a trust that is always considered in equity as done which is ordered to be done; and that the Court cannot measure the time. It might be added that when there is an equitable title vested in possession, without any preceding interest, the possession of the trustee becomes, in the view of a Court of Equity, the possession of the *cestui que trust;* and that there is no sound distinction in principle between the ~~e~~xten~~s~~ion of trust property in specie for the benefit of the *cestui que trust* (though directed to be converted by the will) and the actual receipt of that property, in any way consistent with the continuance of a legal estate in the trustee by the *cestui que trust.*

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It was argued, however, that when sale was the medium by which the testator meant the *cestuis que trust* to be put into possession of their shares, and when the trustees had power to sell at such time as in their discretion they might think fit, the event on which the divesting was to depend might be rendered certain by the exercise of the discretion of the trustees; and that no share was *de jure* receivable until that discretion had been exercised. I cannot accede to this reasoning. The event spoken of in the will is not the completion of any particular sale of particular property, or any other definite act to be done by the trustees; but is the death of a child before receiving "his or her share" of the trust estate; in which case "such share" is given over. The share is spoken of by the testator as a whole. A divesting clause of this nature ought to be construed strictly; certainly it ought not to be extended to any case not properly described by the words, according to their reasonable interpretation. There might be (and the testator takes notice of it) as many sales at different times as there were items of saleable property; according to the exercise of their discretion by the trustees. How can it be said that this testator has declared with reasonable certainty an intention either that part of a share should go over when the whole did not (which is the conclusion of the Lords Justices), or that the whole share should go over in case of the death of a child while any part of his property was retained by the trustees unsold, although payments (which in that case would have to be refunded), might have been previously made on account of that share? It would, in my judgment, be more reasonable to hold (since no part of any share could rightfully be received, except by virtue of a title to the whole) that the rightful receipt of any part would be equivalent, for the purposes of this clause, to the receipt of the whole; and as the Lords Justices have held that *William Hobson* had at the time of his death a right, tantamount in equity to actual receipt, to one third share, not only of the policy moneys and other moneys then actually realized, but even of the value of the copyholds (which had been only ordered to be sold, and not actually sold in his lifetime), this view would be fatal to the Respondent's case, even if the divesting clause, so construed, could receive effect.

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(1) 1 Ves. Jun. 366.

(2) Law Rep. 2 Eq. 404.

I see no ground for holding that the conversion directed by this will was in suspense till the end of twelve months after the widow's death. On this one point I differ from the decision of Vice-Chancellor *Hall.*

I think it right to add, that even if (on some of the questions in this case) I had taken a view different from that which I have expressed, I should have been of opinion that the discretionary powers of the trustees came to an end, if not when the decree for administration was made in the suit, certainly when the order of Vice-Chancellor *Stuart*, of the 24th of November, 1870, was made. I should have thought, that from the date of that order, at all events, the Court must be deemed to have carried on the business for the benefit and in the interest of those persons who would have been then entitled to the proceeds if it had been then actually sold; as much as if they had then elected to take their several shares of the newspaper in specie, without conversion, and had been put into possession of those shares by the order of the Court.

I cannot reconcile the conclusion, that the operation of the divesting clause as to the newspaper property was prolonged by that order, as against *William Hobson*, with the express declaration of the opinion of the Court, that it was "for the benefit of *all* persons interested that the business of the *Leeds Times* should not be then sold."

[A question having been raised as to costs.]

LORD SELBORNE said: It appears to me that, with regard to the costs, the position of the case is this. The present Respondents appealed against the order of Vice-Chancellor *Hall*, not upon the single point upon which your Lordships differed from the exact form of that order, but upon the general merits of the case, and therein they fail in your Lordships' judgment. I think your Lordships must consider how the Lords Justices ought to have, and probably would have, dealt with the costs of the appeal before them if they had come to the same conclusion as that at which your Lordships have arrived. It seems to me that if they had been of opinion that the Appellants before them failed in their contention the natural result would have been that the then petition of appeal would have been dismissed with costs; or if their Lordships thought, as this House thinks, that only a slight formal variation had to be made in the order of Vice-Chancellor *Hall*, that would not have affected the costs of that appeal. I therefore move your Lordships that, in addition to the order that this House is now making, there should be a direction that the costs of the appeal to the Lords Justices be paid by the present Respondents, and that of this appeal before your Lordships' House there should be no costs.

THE LORDS expressed their concurrence.

An Order was afterwards entered on the Journals, which recited the Order of the Lords Justices, and then

Ordered, "That so much of the Order of the Court of Chancery of the 24th of November, 1870, complained of in the said appeal, as declares 'that the direction contained in the will of the testator *Frederick Hobson* as to a sale and disposition of his real and personal estates and his trade or profession, and

H. L. (E.)
1876
MINORS
v.
BATTISON.

the goodwill thereof, after the decease of his wife *Mary Hobson*, at the sole discretion of his trustees or trustee, is a power enabling such trustees or trustee to sell and dispose of the same, and is not to be construed or held as an absolute trust for the sale and disposition thereof on the happening of of such event,' be, and the same is hereby reversed:" And the Order of Vice-Chancellor *Hall*, of the 17th of February, 1874 (except so far as it related to a payment of a sum of money into Court), should be restored, and also except so far as related to the declaration therein contained, that, 'for the purposes of distribution, the testator's estate, including his interest in the *Leeds Times* newspaper, ought to be considered as sold and converted at the expiration of twelve calendar months from the death of the testator's widow;' and instead thereof that it be, and it is hereby Declared, That, in the events which happened, *William Hobson* took under the will of the testator an absolute vested interest in one equal third part or share of the *corpus* or capital of the testator's real and personal estate, including his interest in the *Leeds Times* newspaper, the whole being considered as converted into money, and distributable immediately upon the death of the testator's widow; and that on the death of *William Hobson* such one-third part or share passed to, and is now vested in, the Appellant, as his legal personal representative." And the Respondents were ordered to pay to the Appellant and the trustees the costs of the appeal to the Lords Justices; and the costs of the trustees, in this appeal, were ordered to be paid out of the estate; and with these directions the case was remitted to the Chancery Division of the High Court of Justice.

Solicitors for the Appellant: *Whitakers & Woolbert.*

Solicitors for the Respondents: *W. A. Holcombe; Bell, Brodrick, & Gray; H. B. Clarke & Son.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1876 Feb. 28.

AITON . . . . APPELLANT;

STEPHEN *et al.* . . . . RESPONDENTS.

Harbour—Beaching of Fishing Boats in Winter.

Where the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, and where the proprietor had subsequently obtained a local Act authorizing his levy of five shillings yearly for each boat beached, the fishermens' rights were enforced against him; and it was *held*, that he could not exclude the fishermen from the ground used for beaching without assigning to them other ground equally well adapted for the purpose.

Efficacy of a Local Act.

A local Act of Parliament must be judicially noticed, and must have all the operation of a public statute.

When an Act authorizes the exaction of a toll, the accommodation for which the toll is authorized must be provided.

THE above Respondents, fishermen residing in the village of *Boddam* on the east coast of *Aberdeenshire,* claimed the right, during the winter season, of beaching their boats on certain pieces of ground at or near the harbour of *Boddam,* they paying the Appellant, as owner of the Estate, five shillings annually in respect of each boat. They insisted that their right was founded on the common law, and had been used immemorially; and they relied on the provisions of the 29 Geo. 2, c. 23, s. 2, but more especially on a local Act with reference to the *Boddam* fisheries obtained by the Earl of *Aberdeen* in 1845 (1).

The Appellant, on the other hand, maintained that the pieces of ground in question were his exclusive property; and the Lord Ordinary decided in his favour; holding that the right of property was absolute in the Appellant, and that the Respondents' contention was unsustainable. His Lordship, therefore, gave judgment against them with costs. But on a reclaiming note to the Inner House (First Division), the Lord Ordinary's interlocutor was recalled, and judgment was pronounced finding that the Respondents, as the fishermen of *Boddam*, were well entitled to the beaching accommodation previously enjoyed by them, "and this so long as the Appellant should not have provided other safe and suitable accommodation for that purpose" (1).

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(1) 8 & 9 Vict. c. 25.

Upon this decision, with an award of costs against the Appellant, he appealed to the House, having for his counsel Mr. *Southgate*, Q.C., and Mr. *E. Kay*, Q.C.; the Respondents being represented by Mr. *J. Pearson*, Q.C., and Mr. *Cotton*, Q.C.

At the close of the argument on behalf of the Appellant, their Lordships, without calling on the Respondents' counsel for a reply, delivered the following opinions:—

THE LORD CHANCELLOR (2):—

My Lords, a Herring Fishery existing at *Boddam*, and the fishermen being provided with residences in and about the village, and holding those residences under tacks which fix a certain rent, including all dues connected with the fishery, and their habit and use being to beach their boats during the winter season upon the two pieces of ground specified in the pleadings, the Earl of *Aberdeen*, in 1845, as heritable proprietor of the village, applied to Parliament for an Act which, in the first instance, assumed the shape of a private bill, but which must be judicially noticed as a public Act, and must have all the operation of a public Act. In truth it is an Act of the most comprehensive kind, establishing a public harbour, authorizing tolls to be taken, and containing every clause which would be enacted with reference to the largest harbour in the kingdom (3). It provides for the entrance of foreign vessels, the dues to be taken from them in accordance with the rights and obligations of our treaties with foreign states; it authorizes by-laws to be made, and penalties levied, and, in fact, it forms a complete code for the regulation of a public harbour. The preamble of the Act stated that

> Lord *Aberdeen* was the heritable proprietor of the village of *Boddam*, and of the harbour or port of *Boddam*, and the piers and works therewith connected,

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(1) Court of Sessions Cases, 4th Series, vol. ii. p. 470.

(2) Lord *Cairns*.

(3) The *Boddam Act* has eighty-six sections; declared public and to be judicially noticed. See Local Acts of 1845.

and that it would be of great advantage to the public, and especially to those using the said harbour, if the same were to be improved by deepening and enlarging it, and the entrances and approaches thereto, and by extending the pier and forming a breakwater: And whereas the said Earl and his predecessors, proprietors of the said village, have from time to time expended considerable sums in erecting the present piers and otherwise forming the said harbour, and the Earl was willing to make the improvements at his own expense; and in consideration of the expense which the Earl had already incurred and would incur in making these improvements, it was reasonable that the Earl and his heirs and successors should receive the tolls, rates, and dues hereinafter mentioned.

Then the preamble stated that a map or plan had been deposited, "describing the lines, levels, and situation of the harbour, and the proposed breakwater, and other works, and of the lands" on which they were to be executed. Where works had to be executed, of course it was necessary to describe them, and to indicate the land upon which they were to be executed. The 3rd section provided that

It should be lawful for the Earl and his heirs and successors upon the lands described in the plan and book of reference, at such times and in such manner as he and they might judge proper, to make and execute the improvements and works in the said harbour, and erect and construct the pier and breakwater therein according to the lines on the plan, together with the excavations, and all other works connected therewith, and also to make, build, alter, repair, and maintain within the limits aforesaid such quays, shores, piers, jetties, landing-places, and other works, and such approaches, roads, retaining walls, and embankments, and other works therewith connected as he or they might think necessary for the purposes of the said harbour.

Therefore there was power given, not merely to execute particular works where the face of nature had to be changed, but also to connect with those structural changes such other accommodation as might be found to be necessary for the purpose in view. The 7th section provided that

The Earl might demand and receive for every vessel which shall enter within the limits of the harbour any sum not exceeding the several rates and duties on tonnage specified in the Schedule A.

When your Lordships turn to Schedule A you find that Lord *Aberdeen* might under it demand "for all boats laid up at *Boddam* for the winter season five shillings."

A question was raised with regard to the meaning of the words "laid up," but I think your Lordships cannot be of opinion that any controversy is possible as to the meaning of those words. In the first place, there is no evidence whatever that they have any meaning other than that which is assigned to them by the Respondents here, namely, "beached." In the second place, you have the admission of the Appellant himself, that it is impossible that herring boats can be safely dealt with during the winter months, except by "beaching." Therefore the laying up for the winter must mean beaching. But in addition to that, your Lordships have the best possible testimony, *ante litem motam*, both from Lord *Aberdeen* and from the Appellant himself. In the conditions issued by Lord *Aberdeen* to the tenants he used the term "beaching" as a term which properly described the work of laying up, for which the toll or duty of 5*s.* was to be exacted. Therefore your Lordships will read the schedule as if it provided a fee of 5*s.* for the beaching of every boat that should be beached at *Boddam* in the winter season.

Thus you see, my Lords, there was at the time the Act passed a herring fishery at *Boddam;* it was conducted by fishermen living in cottages provided by the proprietor, and each paying a gross, or, as it is termed, a "slump sum," for the cottage and for all the privileges enjoyed. Then you have the Act of Parliament, which takes notice of that state of things, indicating the advantage to be derived from improving the harbour; for, among other things, the purpose of the herring fishery; and then you have the person who is willing to undertake that work, who appeals to the Legislature for power to levy tolls as a remuneration for the work he was about to undertake; you have him stating that he asks for permission to charge a duty upon every herring boat engaged in the fishing for the privilege of passing in and out of the harbour, and also another duty of 5*s.* for every boat of that kind beached for the winter season; and he is the proprietor of the beach, and on that beach there are at least two places which at that very time were used for the purpose of beaching the boats of these herring fishermen.

My Lords, after all this, is it to be tolerated that the person who has obtained this Act of Parliament, or any person claiming under title from him, is to come before a Court of law and say: It is true that I obtained these powers; it is true that I made this representation to Parliament; it is true that the herring fishery cannot be conducted unless the fishermen have the accommodation of laying up their boats upon the beach during the winter; it is true that I represented to Parliament that if the Legislature would allow me to charge 5*s.* for every boat beached, I would maintain this station as a herring fishery; but now I claim to continue to charge during the herring season a toll for a boat coming in and going out of the harbour, but I refuse to allow that boat that which I admit is an indispensable condition of its existence as a boat pursuing the herring fishery, namely, the accommodation of beaching itself upon the beach which belongs to me, and for which beaching I was authorized by Parliament to take a particular toll? My Lords, if that can be done, the whole Act can be overthrown. The same person may say, I will not allow any boat to come into the harbour. Or he may say, I will allow boats of a particular tonnage, or belonging to a particular nation, to come in. I will pick and choose. My Lords, I apprehend that your Lordships will lay down and maintain this rule, that any person soliciting an Act giving these high powers of charging tolls does it upon the faith of having represented to the Legislature that he would provide the accommodation mentioned in the Act; and that while he exacts the toll, or is in a position to exact the toll, he cannot refuse the accommodation which is pointed out by the Act.

I think it is quite clear that Lord *Aberdeen* considered himself bound to supply the fishermen with the accommodation they had previously enjoyed for the purpose of beaching their boats; and that, on the other hand, he was armed by this Act of Parliament with the power of charging them the 5*s.* for the beaching, and that the 5*s.* was nothing more than what had previously been included in the gross sum which the fishermen had paid to him.

I therefore submit to your Lordships that the interlocutor of the Court of Session is entirely right. It fixes the obligation on the owner of the *locus in quo* of allowing the fishermen to use this ground for beaching their boats as long as he provides no other convenient and safe place for that purpose. It does not prevent his using this land for any other purpose if he provides another place which will be equally safe and convenient for the fishermen. I therefore move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD:—

My Lords, it appears as a matter of fact that for many years before the Act of 1845 the fishermen of *Boddam* had been used to beach their boats on the ground in question. It is immaterial that the number of boats was originally much smaller than at the present time; all the fishermen who required to use the ground for this purpose were permitted to do so.

The Act of 1845 recognised the privilege of the fishermen by giving the right to take a due of 5*s.* for all boats laid up at *Boddam* for the winter season. The Appellant purchased the estate in 1865. He admits that he saw particulars and noticed this charge, for he says:

> I saw the particulars of the purchase when I got the estate. I noticed that a charge of 5*s.* was made for beaching boats. I did not understand that that referred to the statutory charge. I do not think I saw the Act of Parliament for perhaps two years after I bought the estate.

The ignorance of the Appellant of the Act of Parliament is immaterial, for he was bound to make himself acquainted with it, and he adds:

> But I know that a charge was made for beaching boats from the time I became proprietor.

He admits that this charge of 5*s.* was made, and that he knew the terms of the receipts which were given down to the year 1870. These receipts were for beaching boats.

In 1871 the Appellant first thought of resisting the right of the fishermen to beach their boats on the ground in question, and proposed to charge 7*s.* 6*d.*, as he says, to take it out of the category of the 5*s.* charged as harbour dues.

The 5*s.* has been received for many years by the Appellant as a due for beaching boats on the ground in question. The notice appended to the receipts may be taken against the Appellant's contention that the statutory dues referred to boats laid up in the harbour, for they speak of the beaching by the words "laid up *on the lands* of *Boddam.*" I think, therefore, that at least until the harbour is made fit for beaching boats with safety, the fishermen must be protected in the use of the beaching ground they have so long enjoyed without interruption, and I agree with my noble and learned friend that the interlocutor ought to be affirmed.

LORD HATHERLEY :—

My Lords, I entirely concur in this decision, for very much the same reasons as have been stated by my noble and learned friend on the woolsack ; and I do not think it necessary to add anything to what has been already said.

LORD O'HAGAN :—

My Lords, notwithstanding two arguments as able, I think, as any I have heard in your Lordships' House, I am of opinion that the attempt by the Appellant to deprive the Respondents of the privilege they have so long enjoyed cannot be permitted to succeed. That privilege is essential to the prosecution of the industry of the *Boddam* fishermen. It has been enjoyed for a multitude of years. It is recognised by an Act of Parliament which was procured by a private person, and from its nature must be taken to imply a contract, made effective by the sanction of the Legislature, between the nobleman who obtained it on his own representation, and presumably for his own advantage, and that of the persons whom it directly affects.

It is established that the fishing at *Boddam* could not be carried on without fit conveniences for beaching in the winter season ; and the Appellant's own evidence shews that there is no other ground suitable for that purpose to which the Respondents have access, although he says there is " plenty of other ground belonging to himself or others," which might be so employed. The schedule of the Act contemplates the " laying up " of all boats at *Boddam* during the winter, on condition of the payment of 5*s*. Between " laying up " and " beaching " there is no distinction. although in the Court below an attempt was made to deny their identity. This is manifest from the receipts given from 1865 until 1873, and from the cross-examination of Mr. *Aiton* himself, The Act having in specific words, as it seems to me, recognised and regulated the antecedent user, the conduct of the parties afterwards was governed by it, and demonstrated that the construction of the schedule by the proprietor and the fishermen was precisely that on which the Respondents now rely. Until 1865, the beaching went annually on as before; although the proprietor did not for some time exact the payment of the 5*s.* per annum; but when the Appellant came into possession, and ever since, that payment has been regularly received by him and he has given annual receipts for dues which are indifferently described in them as "beaching dues," "dues for beaching," "season's beaching," or "beach dues."

Having regard to the undisputed facts, the claim of the Appellant is in my judgment neither reasonable nor just. He admits that he was a purchaser with notice of the rights of the fishermen: "I saw," he says, "the particulars of the purchase when I got the estate. I noticed that a charge of 5*s.* was made for beaching boats." And having had such notice, and having, for many years, recognised the privilege by receiving the payments, and admitting his full knowledge that the withdrawal of it will be disastrous to the humble men who cannot pursue their calling unless their boats be preserved, as they have been for generations, from the winter storms,—I am clearly of opinion that he should not be permitted to set up a claim which is equally discredited by lengthened usage, consensual legislation, and his own deliberate conduct for so many years.

I therefore entirely concur in the judgment proposed by my noble and learned friend on the woolsack.

Interlocutor appealed from affirmed; and appeal dismissed, with costs.

Agents for the Appellant: *Grahames & Wardlaw.*
Agents for the Respondents: *Holmes, Anton, Greig, & White.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1876
March 9.

HUTTON *et al.* . . . . APPELLANTS;
HARPER *et al.* . . . . RESPONDENTS.

2 App Cas 776

Proclamation of Matrimonial Banns.

Regular marriages *in facie ecclesiæ* must be preceded by banns; the proclamation thereof being *inter sacra*, and forming part of the Church discipline; the civil power in this matter supporting the ecclesiastical authority.

Parish quoad sacra.

Where a severed district has been constituted a parish *quoad sacra*, the proclamation of banns for those who reside in it must be pronounced in the church of the parish *quoad sacra.*

Ministers and Elders.

The ministers and elders of a *quoad sacra* parish "shall enjoy the status and the powers, rights, and privileges of a parish minister and elders of the Church of *Scotland*" (1).

PROCLAMATION of matrimonial banns, an institution originating with the Lateran Council of 1216, was at the Reformation adopted, and has been ever since retained, by the Presbyterian Church of *Scotland*, as applicable to regular marriages solemnized *in facie ecclesiæ.*

The district of *Wishaw* in *Lanarkshire* was in 1855 severed, *quoad sacra*, from the parish of *Cambusnethan*. This change was effected by the Court of Teinds in compliance with the 7 & 8 Vict. c. 44; a statute under which upwards of 200 parishes have been established in *Scotland* for purposes not secular, but sacred; the object being purely ecclesiastical—to meet the spiritual requirements of an expanded population.

The action in the present case was by the minister, kirk session, and session clerk of *Cambusnethan*, praying a declarator that the minister, kirk session, and session clerk of the *quoad sacra* parish of *Wishaw* were not entitled to make proclamations of matrimonial banns in their church, or to exact fees in respect thereof to the injury of the original parish of *Cambusnethan*. The defence was, that as *Wishaw* had been erected into a distinct *quoad sacra* parish, the Defenders were entitled to continue their proclamations of banns.

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(1) The words of the Act, quoted by the Lord Chancellor, p. 467.

The Lord Ordinary (1) held that the Defenders were not entitled to make proclamation of matrimonial banns; which his Lordship considered illegal and invalid in the church of a *quoad sacra* parish, and he interdicted its continuance. In his note Lord *Mackenzie* remarked, that "it was no part of a parish minister's or of an elder's duties to make proclamation of banns; but that the session clerk should do so, or get it done by the precentor;" and he relied on an observation of Lord *Jeffrey* in *McDonald* v. *Campbell* (2), that "since the Reformation the publication of banns had more of a civil than of a religious character."

The *Wishaw* parish reclaimed to the Inner House (Second Division), and the case came on for hearing before seven Judges, the aid of the First Division having been requested. In giving judgment the Lord President observed that the proclamation of banns, though not essential to the constitution of marriage, was necessary for decency and order as a preliminary to the Church ceremony; a preliminary which even the Church itself could not abrogate, as it had come to be recognised by the common law of the land (3). The other Judges concurred; and the Lord Ordinary's interlocutor having been recalled, the present appeal was presented to the House of Lords on behalf of the minister, kirk session, and parish clerk of *Cambusnethan*, on whose behalf the *Lord Advocate* (4) and Mr. *Cotton*, Q.C., were heard as counsel.

Mr. *FitzStephen*, Q.C., and Mr. *Gloag* (of the Scotch Bar), addressed their Lordships for the Respondent.

At the close of the argument the following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (5):—

My Lords, I cannot say that the very elaborate argument which your Lordships have heard at the Bar has raised any doubt whatever in my mind as to the correctness of the decision appealed from. We have here the unanimous opinion of the seven consulted Judges who met together to consider what should be the interlocutor of the Second Division of the Court of Session. No doubt the Lord Ordinary, for whom we entertain great respect, was of a different opinion; but I repeat that there was no dissension whatever between the seven consulted Judges.

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(1) Lord *Mackenzie*.

(2) 9 Scottish Jurist, p. 5.

(3) 4th Series, vol. ii. p. 903.

(4) Mr. *Gordon*, Q.C.

(5) Lord *Cairns*.

By the statute 7 & 8 Vict. c. 44, the district of *Wishaw* was disjoined from the parish of *Cambusnethan*, and was constituted "a parish" or "district" "*quoad sacra*." The question is, where are the banns of marriage to be published under those circumstances? If persons within the disjoined district are about to be married and desire to have their banns published, are they to have them published in the kirk of the old parish or in the kirk of the disjoined district? That, my Lords, depends upon the exact meaning to be given to the word "parish," and the other terms used in the Act of Parliament; but of course your Lordships cannot overlook the strong *à priori* probability that as to persons who are about to treat marriage as a religious ceremony, and comply with those regulations which prescribe publication of banns, any arrangement for the disjoining of a district would have carried with it the power and right to have banns under those circumstances published in the kirk where the persons who were about to be married were in the habit of attending, and in the district where they resided.

But, my Lords, we must put aside the *à priori* probability, and look exactly to what the Act of Parliament has said. Now by the Act of Parliament the Commissioners of Teinds are authorized to erect the new district

> into a parish church in connection with the Church of *Scotland*, and to mark out and designate a district to be attached thereto *quoad sacra*, and to disjoin such district *quoad sacra* from the parish or parishes to which the same or any part thereof may have belonged or been attached, and to erect such district into a parish *quoad sacra* in connection with the Church of *Scotland*.

If the Act stopped there, of course we should have to inquire what is the proper meaning to be assigned to those words "parish *quoad sacra*." But the Act does not stop there; it goes on to say:

> And it shall and may be lawful for the ministers and elders of such parish to

have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of *Scotland.*

Now the minister and the elders constitute together the kirk session of the parish, and it is admitted that the disjoined parish is to have a kirk session. The kirk session, therefore, is to have all the powers, rights, and privileges which a parish minister and elders of the Church of *Scotland* have; and therefore your Lordships have here an enactment that the disjoined parish shall have a kirk session, and that that kirk session shall have in the disjoined parish all the rights of any parish minister and elders of the Church of *Scotland* in any parish.

It is not denied, even if we stopped here, that one of the rights and one of the duties of a kirk session is to require the publication of banns; and by the discipline of the Church to insist upon and enforce the publication of banns. Therefore your Lordships have to ask this question, what reason is there for taking out of the general words of the statute words which confer this important right of enforcing the publication of banns?

Let me further ask your Lordships whether the publication of banns does not come under the words *quoad sacra,* and whether it is not one of the rights which in *Scotland* would be termed *inter sacra.* Now, your Lordships have not here to consider by any abstract standard what things should be called *sacra,* and what things profane. What we have to inquire is, what has been considered in the Kirk of *Scotland inter sacra?* And, my Lords, let us put aside altogether any question of civil enactment, and turn to the law of the Kirk alone, commencing from the earliest times, with the Book of Discipline as it is called, although we might commence earlier. Commencing with the Book of Discipline of the year 1560, and going down from the Book of Discipline through the different Acts of Assembly, your Lordships have a regular course of Church legislation requiring publicity with regard to marriages, requiring the publication of banns through the medium of the kirk session, and visiting with the discipline of the Church those persons, whether laity or ministers, who should disregard the discipline of the Church in that respect. If that be so, if putting aside all questions of civil enactment, your Lordships find the enactments of the Church consistent throughout the period to

H. L. (Sc.)
1876
HUTTON
v.
HARPER.

which I have referred, in requiring the publication of banns, I ask, is not the publication of banns part of the discipline of the Church? The Church went on also to require originally the marriage to be celebrated by a minister of the Established Kirk. That requirement as regards, at all events, the effect of neglecting it, was afterwards modified by civil enactment, to which I shall afterwards refer; but, in the first instance, your Lordships have the consistent law of the Church requiring the publication of banns, and the marriage by the minister. It appears to me, therefore, impossible to say that the publication of banns is not part of the discipline of the Church; and if it be part of the discipline of the Church, is it not a thing which comes under those words used in the language of the Church, "*inter sacra*"?

Then, my Lords, it is said that the publication of banns has been regulated, or in some way dealt with, by civil enactments. But, my Lords, in what way has it been dealt with? The Act of 1661 (1), the Act of *Charles* II., states by way of preamble that "Our Sovereign Lord and the Estates of this present Parliament, considering how necessary it is that no marriage be celebrated but according to the laudable order and constitution of this Kirk," that is to say of the Kirk of the realm, and yet that persons "do procure themselves to be married, and are married, either in a clandestine way contrary to the established order of the Kirk, or by Jesuits, priests," "or any other not authorized by this Kirk;" therefore His Majesty, upon the advice of the Estates, ordains that "whatsoever person or persons shall hereafter marry, or procure themselves to be married in any clandestine and inorderly way, or by Jesuits, priests, or any other not authorized by this Kirk, that they shall be imprisoned." Therefore your Lordships observe that the civil enactment refers to the order and the discipline of the Church, and brings to bear the weight of the civil authority, not in support of some independent enactment of its own, but of that which at that time is recognised and referred to as the law and the order of the Kirk.

It might have been said that the State would recognise in *Scotland* no marriage but a marriage performed by a religious ceremony and according to the order either of the Kirk of *Scotland*

(1) c. 34.

or of any religious denomination in *Scotland*. But, my Lords, if the State thought fit to say so, would that alter the nature of the marriage? Would it make it cease to be a religious ceremony? Clearly not. On the contrary, it would be the strongest affirmation of the State that it was a religious ceremony. And so here your Lordships have the Act of 1661 pointing to the religious ceremony and that which preceded it, the marriage, according to what then was the order of the Kirk, and the publication of the banns which was required, as that which was to be complied with, and to be enforced through this Act of Parliament. It appears to me that neither this Act nor any which followed it in the slightest degree alters the nature of the publication of the banns by merely enacting that the law of the Church shall be complied with.

My Lords, that really is the whole of this case. But for the elaborate argument which your Lordships have heard I should have been well content to say that I concur with every word which has been expressed in the Court below; and I may particularly refer to the very concise and pointed judgment of the Lord Justice Clerk (1), which appears to me to exhaust entirely the

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(1) Lord *Moncreiff*. His Lordship's judgment is not given in the 4th Series of the Scotch Cases, vol. ii. p. 902, where the case is reported, but is set out in the Appellant's print as follows:—

"I arrive at my conclusion upon two very simple propositions. The first is that a parish erected *quoad sacra* under 7 & 8 Vict. c. 44, has within itself all that is necessary pertaining to the government, order, and discipline of the Church of *Scotland* within that territory. A parish *quoad sacra* has its own kirk session, and within the territory of the parish they have the full powers of discipline of any other kirk session in any other parish. Independently of that general rule the terms of the Act of Parliament are quite precise that the ministers and elders of the *quoad sacra* parish shall have and enjoy the status, powers, rights and privileges of a parish minister and elders of the Church of *Scotland*. Now this is not a matter in which it is necessary at all to draw the line between civil and spiritual matters, but what is clear is, that the right of discipline and the obligation to look after the discipline of the Church within the territory, is devolved upon the kirk session of that parish, in the same way, and to the same effect, as any other kirk session of the Church, to administer the discipline of that Church. This next question is, and the only one really, Is the proclamation of banns part of the discipline of the Church? On that matter, either on principle or historically, there is not the smallest doubt. If the proclamation of banns be prescribed by the authority of the Church, and the object for its prescription be the discipline of the parish, then there can be no question that this is a matter which devolves on the kirk session of this parish, as it does to the

H. L. (Sc.)
1876
Hutton
v.
Harper.

whole of the case. I therefore submit to your Lordships that the interlocutor appealed against should be affirmed, and the appeal dismissed with costs.

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kirk session of any other. Now, I do not mean to say that the proclamation of banns in itself is a matter either ecclesiastical or spiritual. It is a matter indifferent in itself. It would be no breach of the distinction between civil and spiritual if the Legislature were to pass an Act regulating the matter of the proclamation of banns absolutely as a civil arrangement, just as they have passed an Act regulating the registration of births, although there was before, and by the very same authority, a very precise provision for the registration of baptisms by the kirk session. These are matters, as I say, indifferent in themselves; but the question is, whether the proclamation of banns was prescribed by the Church for the purpose of discipline, although it might have been enacted by them for purposes of social order. The first Book of Discipline is quite precise on this matter, and that was the very first statement of the principles of the Reformed Church of *Scotland*, and *Knox* himself was a party to it. Now that was the first, and it was followed by a complete succession of Acts of Assembly, going through the whole of the seventeenth century, the Commonwealth and the Revolution, and the last is the Act of 1784, putting an end to the abuse of the session clerk making proclamations without sufficient communication with the kirk session. Whether this be or be not part of the discipline of the Church, I think is a matter that admits of no dispute. It does not relate in any way, in words or in substance, to the constitution of the contract of marriage. It refers to the solemnization or celebration of the marriage, and that is a matter in which the Church takes an interest, and in which the Church prescribes the necessary rules. *Pardovan* says, upon the 18th article of the 13th chapter of the 'Scotch Church Discipline,' which is very frequently referred to in his work, 'Those who live in places where the usual exercise of religion is not established, may cause their banns to be published in Romish churches, inasmuch as the matter is part of the political nature.' And the reason of that is quite plain. It has nothing in itself spiritual, but is of a political nature. And apparently the French Church were willing to accept proclamation of banns in Popish churches, where there were no Protestant churches where it could be done. That does not in the least interfere with the discipline on the part of the Church. On the marriage of parties in *England* and *Ireland* they proclaim the banns in *Scotland*, else the marriage will be against the order of the Kirk; and he says they should be rebuked,—'There is no doubt that they should be rebuked as unnecessary transgressors of a very comely and rational Church order.' I do not think that the nature of the power can be better expressed. As to the statute 1661, I read it in an opposite sense altogether from that which *Pardovan* follows. Instead of being a superseding of the Church in the matter of the proclamation of banns, it gives that a stronger confirmation by attaching penalties to the disregard of it. Therefore, upon the whole matter, I concur in the result at which your Lordship has arrived, and I should be prepared to alter the interlocutor reclaimed against, and to assoilzie the Defenders, with expenses."

LORD CHELMSFORD:—

My Lords, the question upon this appeal is whether, the parish of *Wishaw* having been regularly erected as a *quoad sacra* parish, the minister and elders thereof are entitled to make proclamations of banns of marriages in the church, and to receive dues or fees in respect of such proclamations.

By the 7 & 8 Vict. c. 44, s. 8, it is enacted that the minister and elders of a *quoad sacra* parish shall have and enjoy all the powers, rights, and privileges of a parish minister and elders of the Church of *Scotland.* The House has, therefore, to determine what is the power of the minister and elders of a parish in *Scotland* in respect to the publication of banns of marriage. The duty of publishing banns is attached to the office of clerk of the kirk session, and the due publication of the banns must be certified by him, his certificate not being traversable. The question is, whether all this done by the sole authority of the clerk of the kirk session, and without his requiring any sanction enabling him to perform these duties.

The Lord Ordinary (1), answering the argument of the Defenders, is of opinion that they are mistaken in supposing that the power to proclaim banns is one of the rights and privileges of the minister and elders of a *quoad sacra* parish. I may observe that the question is not here quite accurately described, as the important word "powers" is omitted, and it is confined to the other words "rights and privileges." The Lord Ordinary thinks it is "no part of a parish minister's or an elder's duty to make proclamation of banns. It is the duty of the session clerk of the parish to do so, or to get this done by the precentor."

The Lord President expresses his surprise at this part of the note of the Lord Ordinary, and says: "It is quite true, so far, that a certificate by the clerk of the kirk session is the proper legal evidence of the proclamation having been made, but that is because he is the servant of the kirk session, and acting under their authority and direction; and particularly acting under the authority and direction of the moderator of the kirk session, with whom this matter is specially left by the only existing law on the subject. The minister is the party who is to authorize the proclamation of banns to be made." "And therefore I am humbly of opinion that everything is under the control and direction of the minister as regards the proclamation of banns" (1).

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(1) 4th Ser. vol. ii. p. 894.

According to the view which I have taken of the case, it seems to me not essential to determine whether the publication of banns is *inter civilia* or *inter sacra,* because whether it belongs to the one or other class, it is, in my opinion, equally within the power of the minister and the elders. But taking, as I do, the opinion of Lord *Ardmillan* as a correct description of the nature and character of the publication of banns, it is clear that it must be regarded as a matter of ecclesiastical regulation. He says: "The proclamation of banns is a step of orderly procedure in the celebration of marriage by which religious sanction is given to the marriage." "It is not, I think, a step of civil procedure in the constitution of marriage, but a step of discipline in the orderly ecclesiastical procedure by which the Church gives sanction, seriousness, and solemnity to marriage as the most important and abiding good of all human contracts" (2).

But suppose it should be regarded as a mere civil proceeding, this would not advance the case of the Appellants. At an early stage of the argument I put the question to the Lord Advocate, whether the clerk of the kirk session could publish the banns by his own authority, without the direction of the minister and elders; and I received (as I expected) an answer in the negative, and this seemed to me at once to conclude the case against the Appellants.

The correctness of the answer is proved by the Act of the General Assembly of 1784. By that Act the General Assembly resolved

> That no session clerk in this Church proclaim any persons in order to marriage until he give intimation to the minister of the parish in a writing, dated and subscribed by him, of the names, designations, and places of residence of the parties to be proclaimed, and obtain the said minister's leave to make the said proclamation.

It follows that it is by the authority and direction of the minister, or of the minister and elders, that proclamation of banns can made. Therefore this must be one of the powers possessed by the minister and elders of the *quoad sacra* parish of *Wishaw*, under the provisions of the Act 7 & 8 Vict. c. 44.

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(1) 4th Ser. vol. ii. p. 899.

(2) 4th Ser. vol. ii. p. 903.

I agree that the interlocutor appealed from should be affirmed.

My noble and learned friend Lord *Hatherley*, who has been obliged to leave, desires me to state that he entirely concurs.

LORD O'HAGAN :—

My Lords, in my opinion the decision of the Court of Session ought to be affirmed.

Under the statute a parish *quoad sacra* has been erected, and the first question is, whether the publication of banns is to be considered as *inter sacra*, so as to put it under the direction of the ecclesiastical authorities of the parish so erected? I have no doubt that it is. The institution of banns was purely of ecclesiastical origin, at an early period in the history of the Christian Church; and at that time, at all events, there could have been no question that it was to be held *inter sacra*. The civil state had nothing to do either with the creation or with the regulation of it. It has continued, throughout Christendom, always under Church control; and in *Scotland* we have it clearly shewn that it has remained so till the present hour. The obligation to publish was not cast upon the contracting parties by any statute of the realm, and its enforcement is effected by ecclesiastical censures, assisted to some extent by the civil power. The publication does not concern the constitution of the marriage, but it is made, by ecclesiastical authority, a proper preliminary to it, for the avoidance of clandestinity and the prevention of fraud. All this being so, it seems to me plain that the usage so established and so kept in action is a part of the ecclesiastical discipline of the Scottish Kirk, and must be numbered *inter sacra*; and that the parishioners of *Wishaw* must, therefore, have their banns published in their own parish church, and not in any other.

On this view alone, the judgment we are considering is sufficiently sustainable. But even if that view were doubtful, the terms of the Act of 7 & 8 Vict. c. 44, seem to me decisive of the question. When a parish *quoad sacra* is erected under that statute,

H. L. (Sc.)
1876
HUTTON
v.
HARPER.

the provision of the 8th section is, that "it shall and may be lawful for the minister and elders of such parish to have and enjoy the status and all the powers, rights, and privileges of a parish minister and elders of the Church of *Scotland*." Surely it is amongst the "powers, rights, and privileges" of the minister and elders of a Scottish parish to require and compel the parishioners to publish the banns of marriage according to the law of their Church; and it is also amongst the duties and liabilities which their ecclesiastical superiors will oblige them to fulfil. The words of the section are general, and have no limitation either in any other portion of the Act, in the provisions of any code of discipline, or in the reason of the thing. And on this second ground, even if I doubted, as I do not, with reference to the first, I think the Appellant's contention cannot be supported.

1 App Cas 776.

The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakeably, the purpose of the Legislature. When the words are obscure and the purpose, therefore, more or less doubtful, it may help to a right understanding of them; and, in the present case, the Respondents might fairly pray it in aid, if, on the points to which I have already adverted their case was not impregnable. We can scarcely conceive that the object of the publication of banns being, in the words of Mr. *Erskine* (1), "to prevent bigamy and incestuous marriages," and to prevent them by inviting objections which may defeat fraud and misrepresentation, it could have been intended to direct that publication in a parish other than that in which the contracting parties are resident, and where evidence might most easily be found of their actual *status* and relations with their neighbours. To require it to be made in a strange parish would be to antagonise the very object of the institution and nullify altogether its beneficial operation. To the parties, it would be a hardship to be obliged to resort to a church other than that in which the marriage is to be celebrated; and to the public, it would be a mischief by depriving the subsequent celebration of the security and lawfulness which it would have derived from full local notice of the proposed

(1) Principles, I. 6, 5.

H. L. (Sc.)
1876
HUTTON
v.
HARPER.

contract, such as has been wisely contemplated and enforced by various religious denominations.

My Lords, on these grounds I am clearly of opinion that the appeal should be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed, with costs.

Agents for the Appellants: *Grahames & Wardlaw.*
Agent for the Respondents: *William Robertson.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
May 12, 13, 18, 19; June 1.

T. ROBINS GOODWIN . . . . Plaintiff in Error;

AND

HENRY CHRISTOPHER ROBARTS AND OTHERS . . . . Defendants in Error.

Foreign Loan—Scrip—Negotiability—Negligence.

2 QBD 194-5
5 Ch.D. 211-2
2 CPD. 228
11 Ch.D. 318

The scrip of a foreign Government, issued by it on negotiating a loan, (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest,) is by the custom of all the stock markets of *Europe* a negotiable instrument, and passes by mere delivery to a *bonâ fide* holder for value. English law follows this custom—and any person taking it in good faith obtains a title to it independent of the title of the person from whom he took it.

Per Lord Selborne:—When the instalments mentioned in the scrip have been actually paid, the scrip is as much a symbol of money due, and as capable of passing current by delivery, as the bond itself would be.

The scrip promised to give the bearer a bond for the amount paid. A person who took this scrip as being negotiable, could not, after he had negligently allowed another person the means of transferring (even fraudulently) the possession of it to a *bonâ fide* holder, be heard to deny that the instrument was a negotiable instrument transferable to bearer by delivery.

In the case of such scrip, issued by a foreign Government and circulated in *England* by means of an agent here, who is to receive the instalments, and give acknowledgments for their payment, and to deliver the bonds when they are issued, the contracting party is the foreign Government, and not the English agent.

G. purchased through his broker some Russian and some Hungarian scrip; the undertaking in the scrip was to give to the bearer a bond for the money advanced payable with interest in the way there stated. *G.* left the scrip, (to be exchanged for bonds or sold, as he should direct,) in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself:—

Held, that the scrip was a negotiable instrument, transferable by mere delivery; and that the banker, being a *bonâ fide* holder for value, was not liable to *G.*, either in trover for the scrip itself, or in assumpsit for the value received upon it.

THIS was an appeal against a judgment of the Court of Exchequer Chamber, which had affirmed a previous judgment of the Court of Exchequer. The Plaintiff had brought trover with a count for money had and received. The facts were turned into a Special Case. The Court was to be at liberty to draw any inference of fact. The Case expressly found that there had been a usage on the English and Foreign Exchanges to treat this scrip as passing by delivery.

In February, 1874, the Plaintiff purchased £200 of Russian scrip, forming part of a loan then raised by the Russian Government, and £300 of Hungarian scrip, part of a loan raised by the Austro-Hungarian Government. He employed one *Herbert E. Clayton,* a stockbroker, to make these purchases. The two sorts of scrip (both of which were afterwards fully paid up) were issued under the authority of the two Governments, and the firms of Messrs. *Rothschild & Sons,* of *London,* and Messrs. *De Rothschild,* of *Paris,* were the bankers employed by the two Governments to negotiate the loans.

The Russian loan was for a sum of £15,000,000. The Russian scrip was in this form:—

"Imperial Government of Russia. Issue of £15,000,000 sterling, nominal capital, in 5 per cent. Consolidated Bonds of 1873. Negociated by Messrs. *N. M. Rothschild & Sons, London,* and Messrs. *De Rothschild Brothers, Paris.* Bearing interest half yearly, payable in *London* from the 1st of December, 1873.

"Scrip for £100 stock, No.   . Received the sum of £20, being the first instalment of Twenty per cent. upon One hundred pounds stock; and on payment of the remaining instalments at the period specified the bearer will be entitled to receive a definitive bond or bonds for One hundred pounds, after receipt thereof, from the Imperial Government. London, 1st of December, 1873."

There was a statement of the times when the remaining instalments were to be paid, and a declaration that: "In default of payment of these instalments at the proper dates all previous payments will be liable to forfeiture."

The bonds were executed in *Russia,* and afterwards delivered to Messrs. *Rothschild,* who, about the month of June, 1874 (the instalments having been duly paid), issued them in *England* and *France* to the bearers of the scrip.

The bond declared, "The bearer of this bond is entitled to £100 sterling, with interest at 5 per cent.," &c., "which will be paid on presentation of the coupons hereunto attached;" and there was a provision for the delivery of "new coupons to the bearer" when a bond was not drawn for redemption, and the old coupons had been exhausted.

Everything done in this matter was done under the authority of an ukase issued by the Russian Government, containing several articles, one of which (5th) was in these terms:—

> "The subscription for these bonds shall be opened abroad through the medium of the banking houses of Messrs. *N. M. Rothschild & Sons*, of *London*, and of Messrs. *De Rothschild*, of *Paris*, and in *Russia* by the care of the Minister of Finances."

The Austro-Hungarian Government issued a Hungarian loan for £7,500,000 about the same time, and the scrip and all the documents connected with it were almost identically in the same form.

When the purchase of the scrip was made the Plaintiff did not take it into his own hands, but left it with *Clayton*, his broker, to be exchanged for bonds, or disposed of as he, the Plaintiff, might direct. On the 27th of February, 1874, *Clayton* applied to the Defendants, bankers in *London*, for a loan for himself, and obtained an advance of £800, and part of the security he deposited for this loan was this scrip of the Russian and the Hungarian loans. He afterwards absconded, and the Defendants, for the purpose of repaying themselves, sold this scrip on the *Stock Exchange* in the usual way, obtaining thereby a sum of £471 5*s.* At that time the Defendants did not know that the Plaintiff had any claim upon it.

The Special Case, in paragraph 9, contained the following statement:—

> "The scrip of loans to foreign Governments, entitling the bearers thereof to a bond for the same amount when issued by the Government, has been well known to, and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public for over fifty years.
>
> "It is and has been the usage of such bankers, money dealers, and Stock Exchanges during all that time to buy and sell such

scrip, and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealings, by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign Governments or their agents delivering the bonds when issued to the bearers of the scrip.

"This usage extended alike to scrip issued abroad by foreign Governments, and scrip issued by their agents in *England*, and it extended to the scrip now in question, which was largely dealt in as above-mentioned. Such scrip often passes through the hand of several buyers and dealers in succession before the issue of the bonds represented by it."

The question for the opinion of the Court, as stated in the Special Case, was whether the Defendants were, as against the Plaintiff, entitled to the said scrip and to the proceeds thereof.

The Court of Exchequer, consisting of Barons *Bramwell* and *Cleasby*, held that the Defendants were so entitled, and directed judgment to be entered for them (1). By the Court of Exchequer Chamber, consisting of Lord Chief Justice *Cockburn* and Justices *Mellor*, *Lush*, *Brett*, and *Lindley*, this judgment was affirmed (2). The case was then brought up to this House on Error.

Mr. *Benjamin*, Q.C., and Mr. *Anstie*, for the Plaintiff in Error:—

The paper here claimed by the Plaintiff was his property, and could only be transferred by his will and act. It could not be transferred by the act of a person to whom he had given no authority to make the transfer, and who had attempted to make it in fraud of the true owner. Such a person could not give a title to it better than he himself possessed, for the paper, whatever it might be called, was not in its nature or its form negotiable. It was not a promise to pay money, it was a mere promise to do something which would amount to an undertaking to pay money. It did not, therefore, in any way, fall within the character of a bill of exchange or a promissory note as those instruments were recognised in our general law, or in our Stamp Acts, nor did it even resemble a bill of lading, for it was not a symbol of pro-

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(1) Law Rep. 10 Ex. 76, where the documents are set out in full.

(2) Law Rep. 10 Ex. 337.

H. L. (E.)
1876
GOODWIN
v.
ROBARTS.

perty, and would not pass property. It was not like a bond, which might be negotiable even though it was entirely a foreign bond, and it did not therefore fall within the principle of *The Attorney-General* v. *Bouwens* (1), which treated the bonds of foreign Governments as marketable securities in this country; besides, as an English paper it was not a foreign security at all; it was issued by the *Rothschilds* in this country, and had therefore no character of a bond issued by a foreign Government. The bond might be saleable and transferable by delivery only, but this scrip was a mere promise by the *Rothschilds* at a certain time and under certain circumstances to give such a bond, and was a promise contingent for its performance on the happening of those circumstances; so much was it contingent, that if several payments were made upon it but the last was not made, the whole might be forfeited. This was therefore a mere chose in action, enforceable, if at all, by the form of proceeding peculiar to subjects of that description.

It does not follow because an instrument may be transferred from hand to hand, that therefore it possesses the full legal quality of negotiability. Bills of lading, for instance, are now taken to be symbols of property, and may be so transferred, but the case of *Gurney* v. *Behrend* (2) decided that the title to a cargo might not pass with the possession of a bill of lading, for that such bills were not negotiable to the same extent and with the same legal effect as bills of exchange. And that case has been followed in *America*: *Parsons* on Maritime Law (3), the author there saying: "In this country it is well settled that the bill of lading is *quasi* negotiable only." And that is the true description, for bills of lading are subject to the equities attaching to them in the hands of the original holder, so that the unpaid vendor of the goods may stop the goods *in transitu*. That right has not been taken away by the statute (4).

If it should be argued that this paper was an instrument which had become negotiable by virtue of any mercantile custom, the existence of that custom must be clearly shewn; its recognition by the law of *England*, and its applicability to the sort of instrument now under consideration, must be established. No one of those circumstances could be shewn here. Any custom to be available for such a purpose must be a general, not a merely local or particular custom, and must be such as by the Common Law of *England*, or by the express provisions of an Act of Parliament, would be admitted to be valid. The authorities relied on by the other side were either inapplicable to a case like the present, or they were entirely distinguishable, and even adverse. *Miller* v. *Race* (1) might be taken as the first, but that was the case of a bank note, to which no one could pretend that this scrip bore the slightest resemblance. In *Edie* v. *The East India Company* (2) the only question was whether the omission of the words, " or order," from a second indorsement, had prevented its negotiability, for in its form it was plainly a bill of exchange originally payable to *A*., " or order," and Lord *Mansfield* admitted that he ought not to have allowed any evidence of usage of trade to be introduced there, the law being settled. *Grant* v. *Vaughan* (3) was the case of an order on a banker, it was a distinct direction to pay the money to the " bearer," and there too the matter was held not to be for the consideration of the jury, but to be a point of law. *Wookey* v. *Pole* (4) was the case of an Exchequer bill, which is an instrument issued under statute, and contains an express promise to pay the holder. An instrument not on the face of it negotiable, could not be made so but by legal authority. *East India* Bonds had therefore been held not to be negotiable: *Glyn* v. *Baker* (5); which was at the time it was decided perfectly good law as applied to *East India* Bonds, though they were, after the decision of that case, made negotiable by Act of Parliament. The principle of law was truly stated by Lord Chancellor *Cranworth* in *Dixon* v. *Bovill* (6), where he said that if the convenience of commerce required that such instruments as were there in question (Iron Scrip notes) should be made negotiable, it must be done by the act of the Legislature, for that " the law does not either in *Scotland* or *England* enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title." *Gorgier* v. *Mieville* (1) is not at all in contradiction to these authorities, but really confirms them, for there the instruments were Prussian bonds—not mere promises to give bonds—but actual bonds, and these bonds in words pledged the King of *Prussia* for himself, and his successors, to be liable for the payment of principal and interest "to every person who should for the time being be the holder of the bond," than which a stronger declaration of the right of a bearer could hardly be given, and, on that very ground, Lord Chief Justice *Abbott* likened the instrument to a bank note, and declared that the case of *Glyn* v. *Baker* (2), the authority of which he never attempted to impugn, was distinguishable. The case of *Dixon* v. *Bovill* (3) itself was a case of a promise to deliver property, not merely a promise to give a written authority to deliver it. There, what were called Iron Scrip notes were given; they were documents which were generally treated in the iron trade as representing property, and were treated as transferable by delivery. The note was in this form: "I promise to deliver 1000 tons of iron, when required after the 18th of September next, to the party lodging this document with me." In that document there was a distinct promise to deliver a specific quantity of iron, exactly therefore resembling a promise to pay a stipulated sum of money; and the promise was to deliver it to any one who should lodge the note with the maker (which, again, was in substance a promise to bearer), yet it was held not to be a negotiable instrument passing by delivery only, and that usage in the iron trade did not make it so. *Lang* v. *Smyth* (4) is not an authority for the Defendants, for there the certificates and the coupons expressly mentioned that they were to be payable to "bearer," and they were promises to pay money, and not merely promises to give security for the payment of money. In *Partridge* v. *The Bank of England* (5), though the custom that dividend warrants were payable to parties presenting the same was expressly pleaded and expressly found, the Court of Exchequer Chamber held that these warrants were not negotiable by the general law,

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(1) 4 M. & W. 171.

(2) 3 El. & Bl. 622, see p. 634.

18 Jur 856-8

(3) Bk. 1, c. x. 359, 360, n.

(4) 18 & 19 Vict. c. 111.

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(1) 1 Burr. 452.
(2) 2 Burr. 1216; 1 Sir W. Bl. 295.
(3) 3 Burr. 1516.
(4) 4 B. & Ald. 1.
(5) 13 East, 509.
(6) 3 Macq. Sc. Ap. 1.

(1) 3 B. & C. 45.

(2) 13 East, 509.

(3) 3 Macq. Sc. Ap. 1.

(4) 7 Bing. 284.

(5) 9 Q. B. 396; in Ex. Ch. Ibid. 421.

and that the supposed custom did not make them so. That case, which has never been overruled, is decisive of the present. [THE LORD CHANCELLOR:—That case seems to be a decision more on the form of the pleadings than on anything else.] The case shews that usage was not sufficient to pass the property. This was still more strongly shewn in *Crouch* v. *The Crédit Foncier* (1). The debenture there contained a promise to pay a sum certain on conditions therein named, and also interest, and yet it was held not to be a negotiable instrument, and that a custom of trade to treat it as such could not be set up against the general law.

What is the character of a usage or custom must also be considered. Here what is set up is really no more than a mere usage among bankers—a usage in a particular trade. That alone is not sufficient. A custom or usage in the tallow market of *London* has been held, in this House, not binding on a purchaser of tallow who resided in *Liverpool: Robinson* v. *Mollett* (2).

There was nothing here in the alleged usage that could properly be described as part of the general law merchant recognised in the law. In the judgment in the Exchequer Chamber the Lord Chief Justice incorrectly employed the term "law merchant," for he applied it more than once under circumstances which really amounted only to the usages of a particular trade, not binding on any one not shewn to have been acquainted with that trade. Now not merely the usage of a particular trade, but a general or universal usage, if contrary to the general law, could not be supported: *Meyer* v. *Dresser* (3), where what was described as a universal usage among merchants to deduct from the freight the value of missing goods, was held to be incapable of being supported. Even if it should be admitted that property of this kind could pass by delivery, the admission could only affect those cases where the delivery was made by the owner himself, not those where it was made by a person who was not the owner, and who could only transfer possession of the property by a wrongful act committed upon some other person. Under such circumstances a good title to it could not be got against the true owner. Here the Plaintiff claimed the property in the piece of paper called the

(1) Law Rep. 8 Q. B. 374.

(2) Law Rep. 7 H. L. 802.

(3) 16 C. B. (N.S.) 646; 33 L. J. (C.P.) 289.

Scrip; of that paper he had been wrongfully deprived, and, whatever was the value of that paper—whether it was a mere valueless promise, or was the equivalent of money—he was entitled to recover it. *Bayley* on Bills (1), *Kent's* Commentaries (2), *Chitty* on Bills (3), and *Diamond* v. *Lawrence* (4), were also referred to.

Mr. *J. Brown*, Q.C., and Mr. *C. H. Robarts*, for the Defendants in Error:—

There is not any one of the authorities relied on by the other side which touches the real point in the present case. Whatever constitutes the right of transfer by delivery, and conveys thereby an absolute property in the thing delivered, exists here. It cannot be denied that the bonds of foreign Governments are negotiable here. That has been decided in many cases: *Gorgier* v. *Mieville* (5) was the first. Independently of every other consideration, if they were not negotiable, there must be, in every case of transfer, an investigation into their form and authenticity, which would be a great inconvenience and obstruction to commerce. [LORD SELBORNE:—That the bonds are negotiable is admitted by the Plaintiff in Error; but his contention is that this scrip is not a bond, but only a promise to give a bond, and so not negotiable.] But this scrip declares the bearer to have paid money, and to be entitled, in respect thereof, to have a bond delivered to him. The same principle which makes foreign bonds negotiable must make foreign scrip negotiable. The foreign Government is equally bound by its scrip as by its bonds. Here the acknowledgment of the debt is made by the Russian Government, and is issued to the world by the agents of that Government, but they are no parties to the contract, which is wholly that of the Government itself. A bond is merely a more formal acknowledgment of the debt. This instrument must be construed on the principle laid down in *Unwin* v. *Wolseley* (6), where it was held that a servant of the Crown contracting on the part of the Crown incurs no personal responsibility. That principle, with all the authorities, is fully set forth in *Story* on Agency (7).

(1) C. 5.

(2) Pt. v. sect. xiv. vol. iii. pp. 88, 89, and notes.

(3) Part 1. c. 5 and 6.

(4) 37 Pennsylvania Rep. 353.

(5) 3 B. & C. 45.

(6) 1 T. R. 674.

(7) C. 11, ss. 302, 303.

The use of the word "bearer" in the scrip itself made it negotiable; it made the Russian Government liable to deliver a bond, and pay money to any one who was the actual holder of the scrip at the moment fixed for the issuing of the bonds. And the actual bearer was in no way bound by any legal liability, or by any equities that might be set up as to any of the previous holders of the scrip. In the case of *Re Agra and Masterman's Bank* (1) this principle was applied in the instance of letters of credit, and in the *Blakely Ordnance Case* (2) to the debentures of a company. Had the scrip been granted to a particular person by name, and had the word "order" then been introduced, of course that would have required a written authority from the first grantee. But the word "bearer," without any preceding statement as to the person, dispensed with all that, and made the instrument a negotiable security, passing by mere delivery. It did so because our law adopted, as to such matters, the law merchant, and had done so for a very long period—for, in *Vanheath* v. *Turner* (3), Lord *Hobart* expressly declared that "the Law Merchant was part of the Common Law of the kingdom, of which the Judges ought to take notice." The American law recognises the same principle: *Parsons*' Maritime Law (4).

The first scripholder is clearly estopped from setting up a title against any subsequent honest holder, for he accepted the scrip in the first instance on the terms of its being payable to bearer. To that extent he was a party to the act of the Russian Government in issuing it; he became bound by those terms, as would a shareholder in a company whose deed said that the company would not take notice of assignments of shares on trust. Any person who afterwards honestly paid value for the scrip had a good title as "bearer" against any one who had previously held it. And the first holder, having given to another person the means of defrauding an innocent party, he cannot, as against that party, claim any benefit for himself: *Vickers* v. *Hertz* (5). The new holder was not like the assignee of a covenant running with the land. As to shares in a company, the rule was that every holder of a share, where the name was left in blank, though he omitted to register his own name as a shareholder, became by the mere act of purchasing the shares and holding the scrip certificates liable to the company, and was bound to indemnify the person from whom he purchased: *Walker* v. *Bartlett* (1); *De Pass' Case* (2). But that was not so as to debentures issued by a company payable to "bearer," for they have been held negotiable, and the bearer has been protected against equities which existed between the company and the persons to whom the company originally issued its debentures: *In re The Imperial Land Company of Marseilles* (3).

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(1) Law Rep. 2 Ch. Ap. 391.
(2) Ibid. 3 Ch. Ap. 154.
(3) Winch. 24.
(4) Bk. 1, c. 1, s. 2.
(5) Law Rep. 2 H. L., Sc. 113.

The usage of trade is admissible here to prove the liability, and the cases cited on the other side do not displace but actually prove that doctrine. In *Glyn* v. *Baker* (4) the decision was given on the ground, not of want of a general right, but of absence of the fact on which to found it. The bonds were in form payable to the treasurer of the company, not to bearer; and though it seemed afterwards to be considered that custom ought to render them negotiable, there was nothing on the face of them to shew that they were so. The Court only refused to follow the usage of trade set up there, because the instrument on the face of it did not give rise to the applicability of any doctrine of usage. In *Lang* v. *Smith* (5) the coupons on the Neapolitan bonds were payable to *bearer*, and it was distinctly declared that the evidence as to the character of the *bordereux* and coupons, and the usage applicable to them, was properly left to the jury, and found for the Plaintiff. *Partridge* v. *The Bank of England* (6) does not deny the admissibility of evidence of custom, for there proof of it was admitted, but the question was, whether the other parts of the case made the custom applicable, and whether the pleadings to shew the negotiability of the instrument were, or not, sufficient. In *Jones* v. *Peppercorne* (7) Dutch bonds payable to bearer were treated as passing by delivery, and the custom of brokers was there expressly taken into consideration. And in *The Attorney-General* v. *Bouwens* (8) they, with

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(1) 18 C. B. 845; 25 L. J. (C.P.) 263. 2 Jur. N.S. 643.

(2) 4 De G. & J. 544; 28 L. J. (Ch.) 769, 772. 5 Jur. N.S. 1193.

(3) Law Rep. 11 Eq. 478.

(4) 13 East, 509; see the observations of *Bayley*, J., on the effect of the Defendant's own negligence at p. 515.

(5) 7 Bing. 284.

(6) 9 Q. B. 396; in Ex. Ch. Ib. 421.

(7) Joh. 430; 28 L. J. (Ch.) 158.

(8) 4 M. & W. 171.

(7) S.C. 5 Jur. N.S. 140

Russian and Danish bonds, were treated as so exactly like money that they were held liable to probate duty. So, in *Wookey* v. *Pole* (1), an Exchequer bill in blank, without any name filled in, was held to pass by delivery, and bills payable to a fictitious person, or where no payee was named, have been held to be payable to the bearer. *Collins* v. *Martin* (2), where bills indorsed in blank were held to pass to the holder for value, was there distinctly recognised. In *Brandao* v. *Barnett* (3), where all the authorities were fully considered, the general lien of bankers was recognised as part of the law merchant, though it was held not to arise there on securities deposited for a special purpose only; but on the question of the law merchant generally Lord *Campbell* said (4): "The general lien of bankers is part of the law merchant, and is to be judicially noticed—like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which Courts of Justice are bound to know and recognise." And on that principle it was that in *Gorgier* v. *Mieville* (5) Prussian bonds were treated as passing by delivery, for they were payable to bearer, and recognised as so payable by all mercantile men. In *Crouch* v. *The Crédit Foncier Company* (6) the instrument was held not to be a negotiable instrument, because it was only payable under certain conditions, and because it was thought not to be clear that such an instrument, issued under the seal of a corporation, could be rendered negotiable. There were particular objections to that individual instrument, but they did not contradict nor even in any way impeach the general rule, nor did the conditions existing there apply in this case. In *Ireland* v. *Livingstone* (7) the usage of the Sugar Market in *Mauritius* was allowed to control the execution of a contract made here.

The *Stamp Act* recognises foreign scrip in words as "foreign security" (8), the statute making liable to duty "every security

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(1) 4 B. & Ald. 1.

(2) 1 B. & P. 648.

(3) 12 Cl. & F. 787.

(4) Ibid. at p. 805.

(5) 3 B. & C. 45.

(6) Law Rep. 8 Q. B. 374.

(7) Law Rep. 5 H. L. 395.

(8) 33 & 34 Vict. c. 97, s. 113, schedule, tit. Scrip Certificate; see also 34 Vict. c. 4, s. 2; and see *Grenfell* v. *Commissioners of Inland Revenue*, 1 Ex. D. 242, where bonds of a company

H. L. (E.)
1876
GOODWIN
v.
ROBARTS.

for money by or on behalf of any foreign or colonial state, government, municipal body, corporation, or company bearing date" after the 3rd of June, 1862, which, being payable in the *United Kingdom* is in any way assigned or negotiated here.

Mr. *Anstie* replied.

1876
June 1.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the action out of which this appeal arises was an action of trover, with a count for money had and received, to recover the value of certain scrip, or scrip receipts, for portions of foreign loans, the scrip, or scrip receipts, professing on the face of the documents to pass to bearer, and having been handed over by the broker of the Plaintiff to the Defendants for valuable consideration and without notice of any claim or title of the Plaintiff.

Part of the scrip in question was scrip of a Russian Government loan. Each scrip note was for £100, and represented that when the instalments in which the £100 were to be advanced, were all paid up, the bearer would be, after receipt thereof by Messrs. *Rothschild*, entitled to receive a definitive bond, or bonds, for £100 from the Imperial Government. The £100 were to bear interest from the 1st of December, 1873, and a coupon was attached to the scrip as a warrant for the payment of the half-year's interest due on the 1st of June, 1874. The other scrip related to an Austrian or Hungarian loan, and was in substance in the same form, except that although the interest began to run from the 1st of December, 1873, there was no coupon for the payment of the first half-year's interest. On all the scrip all the instalments were fully paid up before the Plaintiff became owner of the scrip. The receipts for the instalments were signed by the house of *Rothschilds*, but it was not seriously disputed in the argument that *Rothschilds* acted merely as agents for the foreign Governments, and that any liability which existed on the scrip was the liability of the foreign Governments, and not of *Rothschilds*. The Appellant bought the

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issued in *New York*, purchased there, and sent over to *England* and sold here by the agents of the purchaser, were held to be foreign securities issued in *England* within the 34 Vict. c. 4, s. 2.

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scrip on the *London Stock Exchange*, through *Clayton*, his broker. At the time he bought it, the instalments, as I have already said, were fully paid up; that is to say, the whole amount represented by the scrip had been advanced to the foreign Governments; and the scrip receipts represented, upon the face of them, that the bearer, whoever he might be, would be entitled to receive the bonds of the foreign Government for the amount of the scrip.

In this state of things the Appellant, without asserting that any contract exists, or existed, between him and the Russian Government in reference to this loan, or that he is the assignee of a contract with the Russian Government entitled to maintain an action in his own name, insists, notwithstanding, that he had become by purchase the legal owner of the piece of paper described as scrip, which piece of paper the Russian Government would, upon its production, have recognised and exchanged for a bond, and that he is entitled to recover in trover the value of the scrip, which is of course the value of the bond, of which, by reason of his loss of the scrip, he has been deprived.

The Court of Exchequer and the Court of Exchequer Chamber have unanimously decided against this claim of the Appellant, and from those decisions the present appeal is brought.

The question argued in the Courts below was the negotiability of the scrip for a foreign loan, like that in the present case; but there appears to me to be a prior consideration as to the title of the Plaintiff which would alone be sufficient to dispose of his claim. The Plaintiff bought in the market scrip which, from the form in which it is prepared, virtually represented that the paper would pass from hand to hand by delivery only, and that any one who became *bonâ fide* the holder might claim for his own benefit the fulfilment of its terms from the foreign Government. The Appellant might have kept this scrip in his own possession, and, if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession, and under the control, of his broker or agent, and although it is stated that it remained in the agent's hands for disposal or to be exchanged for the bonds when issued, as the Appellant should direct, those into whose hands the scrip would come could know nothing of the title of the Appellant, or of any private instructions he might have given to his agent. The scrip itself would be a representation to any one taking it—a representation which the Appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery; and that no legal claim could be made by the taker in his own name against the foreign Government; still the Appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made.

My Lords, I am of opinion that on doctrines well established, of which *Pickard* v. *Sears* (1) may be taken to be an example, the Appellant cannot be allowed to defeat the title which the Respondents have thus acquired.

But, my Lords, I have no hesitation in saying that I also concur in what I understand to have been the *ratio decidendi* of the Courts below in this case itself. It is well established by the case of *Gorgier* v. *Mieville* (2), an authority which has never been impugned, and which was not in this case disputed at the Bar, that if this action had been brought for the recovery of the bonds, payable to bearer, of this foreign debt, and if there had been evidence of usage or custom as to the negotiability of such bonds, similar to the evidence in the case of *Gorgier* v. *Mieville* (2), or similar to the statements in paragraph 9 of the Special Case before your Lordships, the negotiability of the instruments would have been established.

But it was contended that the scrip was at most a promise to give a bond, and not a promise to pay money, and therefore was not a security for the payment of money. In my opinion it is impossible to maintain this distinction. The whole sum of £100 had been actually advanced and paid; the loan was carrying interest from the 1st of the previous December; there was nothing more remaining to be done on the part of the holder of the scrip; and if any such holder had been asked what security he had for the advance which had been made, he would unhesitatingly have pointed to the scrip. Under these circumstances I cannot regard the scrip as playing any different part from a bond, and the statement in paragraph 9 of the Case, carrying the custom as to negotiability of scrip quite as high as the evidence stating the custom in *Gorgier* v. *Mieville* (1) as to bonds, I am clearly of opinion that we ought to hold, in this case, that this scrip was negotiable, and that any person taking it in good faith obtained a title to it independent of the title of the person from whom he took it.

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(1) 6 Ad. & E. 469, at p. 474.

(2) 3 B. & C. 45.

On these simple grounds, and without going farther into a consideration of the numerous authorities referred to in the Court of Exchequer Chamber, and in the argument before your Lordships, I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed, and this appeal dismissed, with costs, and I move your Lordships accordingly.

LORD HATHERLEY:—

My Lords, I concur in recommending your Lordships to come to the conclusion which has been pointed out by the noble and learned Lord on the woolsack.

The question is really determined by the consideration of three paragraphs in the Special Case, and a consideration of what has already been held by the Courts of Law for more than fifty years since the decision in the case of *Gorgier* v. *Mieville* (1), there having been no decision to the contrary from that time to the present. The Special Case first describes what the scrip is, and then states that it is paid up, and is therefore scrip which, upon its mere production to the Russian Government, entitles the holder, without more, to obtain a bond for the specified sum, as well as entitling him to the interest upon that money which has already been paid in respect of the scrip:—[His Lordship here read the statements of fact and usage contained in the Special Case, see *ante*, p. 478.]

Now in that state of circumstances, the Special Case having told

(1) 3 B. & C. 45.

us how these documents pass, we find that the Plaintiff himself is a person who acquired his title to the scrip in question in that way. He acquired his title by instructing a broker named *Clayton* to go into the market and deal with the Russian scrip in the manner in which the Respondents in the case before us have themselves dealt with it, that is to say Mr. *Clayton* discharged his duty towards the Appellant by the delivery to him of certain Russian and Hungarian scrip fully paid up, without any inquiry whatever as to the preceding title. The Appellant was satisfied with this, without taking into consideration the question whether or not the Russian Government, or the Messrs. *Rothschild*, as the agents, could be considered as the persons primarily liable. He was content to obtain in the market this document, which would entitle him to receive a bond upon its mere production, and, in like manner, upon his parting with it, would entitle any holder to receive a bond in the same way as he himself had become entitled to receive one. He left that document with his broker for disposal, or to be exchanged for bonds as he might think fit to direct. The broker pawned it for a debt of his own.

Now it is also found in the Case that these instruments are taken as securities and pass from hand to hand as such. Here is a gentleman in possession of a document, which on the face of it entitles the holder to receive another document of a different character, a bond instead of scrip, upon the mere presentation by him of that scrip as holder. He knows that if he places this document in the hands of a broker, that broker if he should be told to dispose of it, would dispose of it by simply handing over the scrip as it had been handed to him for his client, the Appellant, when the Appellant became entitled to it. The person buying of his broker would not be expected to ask, and would not necessarily ask, according to the course of business and dealing in the market, any question as to how the scrip had been acquired, or what the title of the previous holder of it had been. The Appellant, therefore, gives the broker scrip which is, and for the last fifty years has been, disposed of every day in the market, and has, for all those years, been so disposed of, upon the sole presentation by the holder, the seller, or pledger, to the person to whom he wishes to sell or to pledge it, and that without any suspicion being aroused to suggest the necessity, or even the propriety, of asking a single other question. Can a person who, himself, in that manner acquired the instrument, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely upon that instrument, but that as soon as he parts with it the new holder will, as he did, become in a position to claim those bonds which he himself might have claimed if he had retained possession of the scrip—can he, placing it in the hands of a broker with no instructions whatever except to dispose of it as he may direct—can he, according to the principle of the cases which were referred to in the course of the argument with regard to limited agency, hold any person to be bound by that limited agency, when on the face of it that which constitutes, you may say, the authority of the agent, namely, the possession of the document, appears to be sufficient alone for obtaining the bonds in question? I agree with my noble and learned friend on the woolsack in thinking that this case might be disposed of upon that ground alone.

But my Lords, we are brought to the same conclusion if we refer to the decision in the case of *Gorgier* v. *Mieville* (1), and consider how that case has been acted upon for the last fifty years according to the statement contained in the Special Case itself. In the very able argument of Mr. *Benjamin*, who always addresses us very efficiently, it was pointed out that there was a distinction between that case and the present, but the only difference is this: in that case the Court had to deal with the bonds themselves on which the Prussian Government was bound to make the payment; in this case we have to deal with an instrument which entitles its holder to receive those bonds, all the payments on the scrip having been made at the time when it was handed over. Can there be any rational distinction drawn between those two documents? or, as Mr. Baron *Bramwell* put the question, if a broker was able to go into the market with a portion of this scrip in one hand and a bond in the other, and sold them both, could you hold that there was a substantial or rational distinction to be drawn between the right of a person who so acquired, according to the practice of the *Stock Exchange,* the one document, and the right of a person who in the same way acquired the other?

(1) 3 B. & C. 45.

I do not think we need go into the nice distinction which Mr. *Benjamin* so ingeniously laid before us by tracing the gradual extension of the doctrine of the negotiability of instruments. I think it would be sufficient to rest upon the decision in the case of *Gorgier* v. *Mieville* (1), and to say that there is no substantial distinction in fact between the instrument in that case and this instrument, which was immediately exchangeable for money and intended to be so; and farther, that no sufficient authority is given by the doctrine of principal and agent which would authorize your Lordships to say that a man who gives his agent full power, according to the custom of the market in which he employs him, of disposing of an instrument of that kind, by giving him an instrument which, according to the custom of that market, is passed from bearer to bearer, can be heard at the same time to say, there are secret instructions known to me and my agent only which limit his right to that right which alone I say I have conferred upon him as my agent. The Appellant having entrusted this document to the agent, and the agent having parted with it according to the custom of the market, and there being a *bonâ fide* title on the part of the acquirer, it appears to me that that title is perfectly good against the Appellant.

LORD SELBORNE :—

My Lords, the scrip in this case is not one of those contracts in writing which have their nature, incidents, and effects, defined and regulated by British law, so that a Judge in a British Court is bound, without evidence, to know whether (and how, if at all) they are legally transferable, and to reject any evidence of a customary mode of transfer at variance with the law. It is not like the Iron note, which was the subject of Lord *Cranworth's* remarks in *Dixon* v. *Bovill* (2), nor like the bonds in the case of *Crouch* v. *Crédit Foncier Company* (3). The Court of Queen's Bench in deciding that case relied upon the distinction between "English instruments made by an English company in *England*," and "a public debt created by a foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder, on which there cannot properly be said to be any right of action at all, though the holder has a claim on a foreign Government." The Russian and Austrian scrip now before your Lordships belongs, in my judgment, to the latter and not to the former category; and I know no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country, according to any custom or usage of trade which may be shewn to prevail, if consistent with what appears upon the face of the instruments. Considering it to be clear that the engagement (whatever may be its effect) which appears on the face of this scrip is that of the foreign Government, and not of Messrs. *Rothschild*, I desire to express my entire agreement with what was said by the late Master of the Rolls (Lord *Romilly*) in *Smith* v. *Weguelin* (1): "It is, in my opinion, a complete misapprehension to suppose that, because a foreign Government negotiates a loan in a foreign country, it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does not, in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever may be the bondholders. Suppose a French or Belgian company, residing in *Paris* or in *Brussels*, should instruct an agent in *London* to subscribe for some of these bonds, is the contract between the Peruvian Government and a French company, or between the Peruvian Government and a Belgian company to be regulated by the English law, because the contract is made by their agents in *London*, or are the contracts to vary according to the domicil of the subscriber to the loan? If the French Government should negotiate a loan on certain specified terms, whether negotiated in *Brussels*, in *London*, or in *Paris*, the same law must regulate the whole, and that law is the law of *France*, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So, if the English Government were to negotiate a loan in *Paris* or in *New York*, the English law must be applied to construe and regulate the contract."

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(1) 3 B. & C. 45.

(2) 3 Macq. Sc. Ap. 15.

(3) Law Rep. 8 Q. B. 384.

(1) Law Rep. 8 Eq. 212, 213.

The Special Case on which your Lordships have to decide is silent as to the laws of *Russia* and of *Austria* with respect to the character and negotiability of these instruments. They must be construed (as was laid down by Lord *Lyndhurst* in *The King of Spain* v. *Machado* (1)) according to the obvious import of their terms; and the Special Case here states (paragraph 9) that they have been largely dealt in according to a usage which for more than fifty years has generally prevailed among bankers, money dealers, and the members of the English and foreign exchanges, with respect to the scrip of loans of foreign Governments entitling the bearer thereof to bonds for the same amount, when issued by the Government. This usage (which is expressly said to have extended to the scrip now in question, and to have been always recognised by the foreign Governments delivering the bonds, when issued to the bearer of the scrip) has been to deal with such scrip for the purposes of purchase, sale, and loans of money on security, as a negotiable instrument transferable by delivering only. According to the opinion of Lord Chief Justice *Tindal* in *Lang* v. *Smyth* (2) the proof of such a usage is sufficient to justify the inference that such instruments are negotiable in the states by which they were issued, so as to render evidence of the laws of those states unnecessary. Lord Chief Justice *Tindal* added (3) in the same case, that "the question" (when the effect not of the instrument transferred but of the transfer of that instrument in *England* is the thing in controversy) "is not so much what is the usage in the country whence the instrument comes, as in the country where it was passed."

The usage so stated in the Special Case appears to me to be the legitimate, natural, and intended consequence (unless there should be any law to prohibit it) of that representation and engagement which appears on the face of the scrip itself when construed according to the obvious import of its terms. It is, in its proper nature, a receipt or voucher for the several instalments, the payment of which in full was to entitle the bearer to a bond for the amount therein mentioned, between the person to whom it was first issued, on the payment of the first instalment, and the Russian or Austrian Government; there was no other contract than this, that in exchange for his money, he should receive this document as an instrument intended to give title, not to himself as an original creditor of that Government, nor to any other person as deriving title under him by assignment, but directly and immediately to any one who might happen to be the bearer when the time for the delivery of the bond should arrive. The value and marketable quality of the scrip depended on its having this particular nature and character, and to have this nature and character it was necessary that it should be capable of passing from hand to hand as a negotiable instrument. That such was the intention of the Government which issued it cannot admit of doubt; and the Plaintiff (whose own title was so acquired), and every other holder, must be taken to have acceded and to have become a party to the representation made upon the face of the document, by virtue of which it did in fact obtain general currency in the English markets, and also in the markets of *Europe*. I should myself have found no difficulty in coming to a conclusion favourable to the Respondents on these grounds. But when the fact is added, that, before the delivery of this scrip to the Respondents all the instalments necessary to give a complete and absolute right to the £100 stock mentioned on the face of it had been actually paid, the case becomes more clear. After those payments had been made, and receipts for them signed, the scrip was as much a symbol of money due, and as capable of passing current upon the principle explained in the authorities with respect to bank notes and Exchequer bills, as the bonds themselves would have been, if they had been actually delivered in exchange for it. It represented (though in a different form) precisely the same kind and amount of indebtedness of the foreign Governments which the bond would have done; and I agree with Baron *Bramwell* in thinking that under these circumstances there is no substantial difference between the present case and *Gorgier* v. *Mieville* (1).

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(1) 4 Russ. 225. (2) 7 Bing. 284. (3) 7 Bing. at p. 293.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 1st June, 1876.

Solicitor for Plaintiff in Error: *J. Brend Batten.*

Solicitors for Defendants in Error: *Trinders & Curtis Hayward.*

(1) 3 B. & C. 45.

[HOUSE OF LORDS.]

H. L. (E.)
1876
June 15, 20.

ZACHARIAH CHARLES PEARSON . . . PLAINTIFF IN ERROR;

AND

THE DIRECTORS, &c., OF THE COMMERCIAL UNION ASSURANCE COMPANY . DEFENDANTS IN ERROR.

Ship—Fire Policy—Usage.

3 Q.B.D. 589

A time policy against fire was effected on a steam-ship. The policy described it as then "lying in the *Victoria Docks*," but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was *Lungley's Dock*, at some distance up the river. To go there it was necessary to remove the paddle-wheels; they were removed in the *Victoria Docks*, and the ship was then towed up to *Lungley's Dock*. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the *Victoria Docks*, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—

Held, that the policy covered the ship while in the *Victoria Docks*, and while passing from them to the dry dock, and while directly returning from the dry dock to the *Victoria Docks*; but did not cover the vessel while moored in the river for a collateral purpose.

Per LORD CHELMSFORD:—An insurance against fire necessarily has regard to the locality of the subject insured.

Per LORD O'HAGAN:—To construe the policy as allowing the vessel to remain in the river while the paddle-wheels were replaced, would be to add a new condition to the policy, which could not be done.

THE Plaintiff had effected a policy of insurance against fire upon the steamship *Indian Empire*, for three months, from the 14th of May, 1862, to the 14th of August, 1862. The policy thus described the subject of the insurance: "£10,000 on the hull of the steamship *Indian Empire*, with tackle, furniture, and stores on board, lying in the *Victoria Docks, London*, with liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy."

The declaration on the policy alleged a total loss during the currency of the policy.

H. L. (E.)
1876
PEARSON
v.
COMMERCIAL
UNION
ASSURANCE
COMPANY.

The Defendants pleaded that the ship was not in the *Victoria Docks,* nor in any dry dock, within the meaning of the policy, nor on the way to or from such dry dock, nor in the course of lighting the boiler fires, nor did the loss occur by the lighting of such fires, and that the loss did not happen while the ship was covered by the policy. Issue thereon.

The cause was tried at the *London* sittings after Trinity Term, 1863, before Lord Chief Justice *Erle,* when it appeared that it had been found that the vessel was too large to go into a dry dock adjoining the *Victoria Docks,* and that the only dock in which it could go was *Lungley's Dry Dock,* two miles higher up the river, and that to go there it was necessary first of all to remove the lower half of the paddle-wheels. This operation was performed in the *Victoria Docks,* and the vessel was then towed by a tug up to *Lungley's Dock.* When the repairs required to be made there were finished, the vessel was towed down the river, but not into the *Victoria Docks,* but was moored in the river 600 or 700 yards from the *Victoria Docks,* and out of the course from *Lungley's Dock* to the *Victoria Docks,* and while so moored in the river the paddle-wheels were brought down on a barge in order to be refitted. The work was proceeded with as quickly as possible, and the vessel was intended to be brought, with all dispatch, into the *Victoria Docks* to have the final repairs completed. Before the 14th of August, 1862, and before the paddle-wheels were re-fitted, and while the vessel was still lying in the river, it was accidentally burned. Evidence was given to shew that it was the custom of all shipbuilders and owners in similar cases to replace the paddle-wheels outside the docks, and that many of the insurance offices so far recognised this custom that, though there were elaborate and excellent preparations for protection against fire in the *Victoria Docks,* they made no difference in the premiums on account of the vessel being in the river instead of being in the docks. It also appeared that the replacing of the paddle-wheels would be effected at a less expense in the river than in the docks.

The jury returned a verdict for the Plaintiff, which on motion in the Court of Common Pleas was set aside, and a nonsuit ordered to be entered (1). On appeal to the Exchequer Chamber this judgment was affirmed (1). The case was then brought up to this House.

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(1) 15 C. B. (N.S.) 304; 33 L. J. (C.P.) 85. 10 Jur NS 517.

Mr. *Watkin Williams*, Q.C., and Mr. *Lanyon*, for the Plaintiff in Error:—

All that had been done by the Plaintiff was warranted by the circumstances of the case, and till the 14th of August the ship was covered by the policy. It was not intended that the ship should be all the time in the *Victoria Docks*. On the contrary, it was expressly stipulated that the ship was to be at liberty to go into a dry dock, and, of course, that stipulation included its return to the *Victoria Docks*. No unnecessary delay had occurred; everything customary had been done, and done with proper dispatch; and the ship was to be considered as on its way back to the *Victoria Docks*, when it accidentally took fire and was burned. Being on its way thither, it was, while so, protected by the policy. This was the very loss against which the policy had been intended to give protection. The custom of shipbuilders in such cases was clearly proved at the trial, and *Noble* v. *Kennoway* (2) established that underwriters were bound to know the peculiar circumstances of the trade to which their policies related. In *Pelly* v. *Royal Exchange Assurance Company* (3), which was, like the present, a case on a policy of insurance against fire, it was declared that if what was done was "in the usual course, or *ex justa causa*," the master was not in fault (4), especially as the usage was known and foreseen (5). These cases supplied the true principle by which the present ought to be decided. There was here no ground for alleging a deviation, though, if that should be contended, the answer was that even a deviation might not be without justification, but must be looked at with reference to the usage in the trade. *Bond* v. *Gonsales* (6); and *Vallance* v. *Dewar* (7), is to the same effect; so that even if there had been any deviation, the usage of the trade justified it. And the same doctrine was applied in *Moxon* v. *Atkins* (8), where the policy itself was "at and from the ship's loading port or ports in *Amelia Island*," and the ship did not load there; but, according to the custom in that particular trade, took in its cargo at *Tigre Island*, which lay a little farther up the river; yet the policy was held to attach, because such was the custom of that trade. In *Bouillon* v. *Lupton* (1) the usage of the trade was again recognised, and though the exact terms of the policy were not fulfilled, it was held to protect the ship, because what was usual and prudent had been done. And the same principle was applied in *Lindsay* v. *Janson* (2); and in *Newman* v. *Cazalet* (3), the value of usage in matters of trade is spoken of as "sacred." The Courts in *America* acted on the same principle: *Phillips* on Insurance (4). Here there could be doubt that it was the intention of all parties to protect the ship during its return from the dry dock to the *Victoria Docks*, and it was in the course of its return thither that the loss happened.

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(1) Law Rep. 8 C. P. 548.
(2) Doug. 510.
(3) 1 Burr. 341.
(4) Ibid. 348.
(5) 1 Burr. 350.
(6) 2 Salk. 445.
(7) 1 Camp. 503.
(8) 3 Camp. 200.

Mr. *Cohen*, Q.C., and Mr. *C. J. Mathew* (Mr. *Benjamin*, Q.C., was with them), for the Defendants in Error:—

No analogy can be drawn from a voyage policy to apply to this case. Most of the cases cited being those of voyage policies are therefore inapplicable. Where it is impossible to follow the words of the policy, usage may be resorted to for the purpose of explaining and applying them; but that cannot be done where, as in this case, they were wilfully disregarded. Here were particular and express stipulations—the limits both of time and place were exactly fixed; the Plaintiff disregarded them all, and, for the purpose of saving expense, kept the vessel in the river, beyond the time necessary for it to make its return voyage from the dry dock to the *Victoria Docks*. No mere usage of vessels getting their paddle-wheels refitted in the river, where there are no such precautions against fire as there are in the *Victoria Docks*, can apply here against the plain terms of the policy.

Mr. *W. Williams*, in reply.

(1) 15 C. B. (N.S.) 113; 33 L. J. (N.S.) (C.P.) 37. 10 Jur NS 422.

(2) 4 H. & N. 699.

(3) Park on Ins. 424, n. (*a*).

(4) Vol. i., p. 489, and the cases there cited.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, the insurance in this case was an insurance against fire, effected with the Respondents by the Appellant, on a large paddle-steamer called the *Indian Empire,* which so long ago as the year 1862 the Plaintiff was proceeding to have repaired in the port of *London.*

The policy is a time policy for three months from the 14th of May, 1862, till the 14th of August, 1862. The insurance, however, does not protect the ship wherever it might be, or wherever it might be in the port of *London.* The ship is confined and localised for the purpose of the risk by these words: "lying in the *Victoria Docks, London,* with liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy."

The ship is therefore covered by the policy during the three months so long as it is lying in the *Victoria Docks,* and so long as it is in a dry dock, or at all events in a dry dock in the port of *London.* Nothing is expressly said as to the insurance attaching while the ship goes from the *Victoria Docks* into dry dock; but the Courts below have held, and, as it appears to me, rightly held, that the liberty to go into dry dock necessarily carries with it the protection of the insurance while the ship should be in transit from the *Victoria Docks* to the dry dock, and back again.

I think, farther, there can be no doubt that on the transit to and from the dry dock the ship would be at liberty to do anything and everything usual under the circumstances for the accomplishment of the end in view, namely, the transit to and from the dry dock. Any delay usual under the circumstances, any deviation usually or conveniently made from the straight line, provided the delay and deviation are connected with, and tend to, the attainment of the end in view, would, in my opinion, be justifiable under the words of the policy which I have read. A delay or deviation of this kind would fairly come within the words of Lord *Mansfield* in the case of *Pelly* v. *The Royal Exchange Assurance* (1) cited at your Lordships' bar, in which Lord *Mansfield* said: "It is absurd to suppose that when the end is assured the usual means of attaining it are meant to be excluded." If, on the other hand, a delay in the

(1) 1 Burr. 341.

transit to or from the dry dock were to occur, not as part of the usual and ordinary means or mode of effecting the transit, but for some collateral object or purpose, then, in my opinion, however usual and convenient a delay for the purpose of attaining that collateral object might be, the ship would not, during the delay, be covered by the policy.

It is unnecessary to speculate whether the risk would or would not be greater while the ship was in the river than when it was in the dock. There is, as it seems to me, evidence that the risk would be greater in the former case than in the latter, but it is sufficient to say that the Respondents have defined the risk which they were willing to undertake, and that risk cannot be enlarged beyond the ordinary meaning of the words upon any theory that the difference of risk is immaterial.

Applying these observations to the facts of the present case, your Lordships find that the dock called *Lungley's Dry Dock* was the only dry dock in the *Thames* which could take in the *Indian Empire,* and that even into this dock the ship could not be received without taking off the lower half of the paddle-wheels. Accordingly the lower halves of the paddle-wheels were taken off in the *Victoria Docks,* and, having thus been made ready for the dry dock, it was towed two miles up the *Thames* from the *Victoria Dock* to *Lungley's Dry Docks,* and the repairs were proceeded with, and, so far as they were to be done in the dry dock, were completed there.

The ship was then taken out of the dry dock, and it being intended to take the ship back to the *Victoria Docks,* there was nothing to prevent it being taken back there at once, and the halves of the paddle-wheels might have been replaced, just as they had been removed, in that dock. In place, however, of being towed back to the *Victoria Docks,* it was towed still farther up the river and moored there; the paddle-wheels were brought from the *Victoria Docks* in a barge, and the work of replacing them was proceeded with in the river. While this was being done, the repairs to the masts, rigging, and capstans of the ship, and other carpenters' and joiners' work, were continued at the same time, and at the end of ten days, before the paddles were completely replaced, the ship was burnt.

It is found by the Case that it is usual, after a ship whose paddles have been removed is taken out of dry dock, to moor it in the river for the purpose of replacing the paddles. And it is also found that though the paddles could have been replaced equally well in the *Victoria Docks*, it would have cost four times as much as if done in the river.

My Lords, I am clearly of opinion that the delay which was thus occasioned was a delay for a purpose altogether collateral. When the ship left the dry dock the course, if it was wished to maintain the insurance, was to bring the ship back to the *Victoria Docks;* and I assume that anything done in the usual course towards the attainment of this end would be within the insurance. But that which was done did not, in any way, contribute to that end. It may have been usual, and because it was economical it may have been convenient, but it did not in any way facilitate or conduce to the transit of the ship to the docks from which it had come.

My Lords, it was the unanimous opinion of the Court of Common Pleas and of the Exchequer Chamber that the Respondents, in the events which have happened, were not liable under this policy for the loss which occurred. I think there is no ground whatever for differing from their judgment, and I propose to your Lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD :—

My Lords, from the moment this case was fully opened, it seemed to me impossible to doubt the propriety of the judgment in which no fewer than ten Judges agreed. I can see no ground for the statement which was made to us on the part of the Appellant, that the true point of the case was never submitted to the Court. Everything which was urged in argument before us appears to me to have been brought under the consideration both of the Court of Common Pleas and of the Exchequer Chamber.

The question turns entirely on the construction of the policy, which is a localised time policy against fire, upon the steamship "*Indian Empire*, lying in the *Victoria Docks, London*, with liberty to go into any dry dock." The place to which the insurance principally applies is the *Victoria Docks*, this place the vessel is to be at liberty to leave only for the purpose of going into a dry dock for repairs. That object being satisfied, the policy seems to require that it should return without delay to its original situation, and be again "lying in the *Victoria Docks.*" Of course the policy implicitly covers the permitted transit to and from one dock to the other. But if the parties contemplated (as it is clear they did) that during the currency of the policy the vessel would be usually lying in the *Victoria Docks,* when the intended repairs in the dry dock were completed, it was the duty of the assured to return without delay to the *Victoria Docks.* Instead of doing so, the ship was towed to a port of the river about 600 or 700 yards from the *Victoria Docks,* and there moored for ten days, during which time it was, while so moored, totally destroyed by fire. The loss, therefore, did not occur in the actual passing from the dry dock to the *Victoria Docks.*

But it is said for the Appellant that according to the usual course of proceeding in the repair of steam-vessels of the size of the one in question, the mooring in the *Thames* for the purpose of replacing the half of her paddle-wheels must be regarded either as a necessary incident to the transit from the dry dock, or must be taken to have been intended to be included in the policy.

But it seems to me that the precise terms of the policy afford no ground for such an argument. An insurance against fire necessarily has regard to the locality of the subject-matter of the policy, the risk being probably different according to the place where the subject of the insurance happens to be. In the present case it appears that there was greater risk where the loss happened than there would have been in the *Victoria Docks,* to which place the policy principally applied.

The parties cannot be said to have contracted with reference to the usual practice of large paddle steamers going into dry dock to remove a portion of their paddle-wheels, because it is stated in the special case that neither party knew the vessel was of a width too great to admit of its entering the dock adjoining the *Victoria Docks,* where it would be expected it would go under the liberty to go into dry dock. And therefore the argument of the Appellant must go the length of asserting that it was an implied term of the policy, that if it should be necessary to remove a portion of the paddle-wheels for the purpose of enabling the vessel to enter the dry dock, its return to the *Victoria Docks* might be delayed during the mooring in the *Thames* for any time that was required to complete the work of replacing the wheels.

But I agree with what was said by Mr. Justice *Blackburn* in the Exchequer Chamber, that if the parties wished to cover the risk while the ship was so moored they should have provided for it by appropriate words in the policy. Whether the underwriters would have undertaken this risk it is impossible to say; as they were not aware that it would arise there was of course no provision applicable to it.

It would be a strong implication to raise against the underwriters, that they necessarily contracted by the policy to extend the locality to which the insurance against fire was expressly confined, upon the ground of a usual practice of dealing with large steam vessels under repair, which they did not know would have to be resorted to on the part of the assured. More especially is this the case, when it appears that the whole work upon the paddle-wheels might have been done in the *Victoria Docks*. In fact the halves of the wheels were taken off in the *Victoria Docks*, and it is stated in the special case that the work of replacing them might have been done equally well in those docks, but that it would have cost four times as much as if done in the river; a very good reason for the assured running the risk of performing the work beyond the limits of the policy, but no reason at all for imposing upon the underwriters, by implication, an undertaking to accept a risk different and more extensive than that to which they expressly agreed to be liable. The policy only attached while the vessel was in the *Victoria Docks* or the dry dock, or was passing directly to and from one dock to the other. It therefore did not extend to the time while the ship was moored in the *Thames*, and the underwriters are not liable for the loss which then occurred.

I am therefore of opinion that the judgment appealed from is right, and must be affirmed.

LORD PENZANCE:—

My Lords, the protection intended to be given by this policy was

H. L. (E.)
1876
PEARSON
v.
COMMERCIAL
UNION
ASSURANCE
COMPANY.

limited expressly not only to a period of three months but to a particular place, the *Victoria Docks*, in which the vessel was to lie. When lost it was not "lying in" that place, but was moored in the river, and the only question is whether at the time of the loss, being moored in the river was a circumstance within the special liberty, which had been reserved to the owner in the policy, under the words "with liberty to go into dry dock."

The Court of Common Pleas held, as it seems to me very properly, that this liberty was not confined to any particular dry dock, and that the Plaintiff might take the vessel to any "convenient" dry dock without losing the protection of the policy. The vessel, therefore, was justified within the limits of the "liberty" in proceeding to *Lungley's Dry Dock*, two miles away from the *Victoria Docks*, in which it was to lie, but it is contended that those limits were exceeded in the course taken with the vessel on its returning from the dry dock.

In construing the meaning and extent of this "liberty" I think great latitude should be allowed. To state at length in writing all that the vessel might be intended to be allowed to do in going to the dry dock, in lying there while repaired, and then returning, the length of time to be occupied, and all that was to be done in various alternative events, would be the work of a lawyer, and a work that could not be comprised in any but a very lengthy document. The convenience of mercantile transactions makes this impossible in many cases; and in this mercantile contract of insurance especially, it is always the custom to express the mutual bargain in short and conventional terms.

In construing such terms, it is always to be borne in mind that the object of insurance is indemnity from the risks attending some commercial adventure or operation which the owner of the subject of insurance is engaged upon; and it is well understood by both parties that the desire and object of the assured is that the policy should extend to all such risks, of the character insured against, as may arise by the adventure or operation being carried out in the usual and ordinary manner. The assured, therefore, is not intended to be bound to make his mode of carrying out the adventure conform to the words of the policy, rigidly construed, and confined to what is absolutely necessary; but the general words of the policy are intended to be construed so as to conform to the usual and ordinary method of pursuing the adventure.

This, as I understand it, is the principle pervading the cases on voyage policies which have been cited; the delay in landing the goods while fishing at *Labrador;* the storing of the ship's furniture on land at *Canton;* and the intermediate voyage on which the vessel was engaged in banking at *Newfoundland,* are all instances of a policy being extended to cover proceedings which were usual and ordinary in the course of performing the voyage assured, though the exact words of the policy did not extend to them, or were even adverse to them. To the extent, therefore, of the principle involved in those cases, I think they are applicable to the present case, although I do not think that this "liberty to go into dry dock" can be said to have all the incidents of a voyage policy.

It follows from this that the vessel in proceeding to *Lungley's Dry Dock,* in being repaired there, and in returning to the *Victoria Docks,* would be protected so long as it was engaged in doing not merely what was necessary, but what was ordinary and usual for those purposes. If, for instance, it was usual though not necessary, to take off part of the paddle-wheels (as is admitted to have been the case here) before entering the dry dock; and farther, if, in order to do that, it had been usual for the vessel to lie a certain time in the river outside the dock while it was being done, I should have thought that the vessel would have been protected in doing so, because it was taking the usual course for the purpose of going into dock and being repaired. But when the repairs were completed (or so far completed as they were intended to be in the dry dock) and the vessel was brought out of that dock again, all that remained to be done, within the liberty conceded in the policy, was to return to the *Victoria Docks.* And here again, if it had been usual to wait a tide in the river, or perform the passage in any particular way, thereby encountering a delay which was usual though not necessary, and the vessel had done so, I should still have thought that it would have been protected.

But what the vessel really did was to abandon, for the time, returning to the *Victoria Docks,* and to remain for some days in the river for the purpose of a certain repair, namely the putting on of the half paddle-wheels which had been taken off, a purpose which had no connection with returning to the *Victoria Docks*, and was in no way even ancillary to getting there. It is admitted that it is usual for shipowners to have this species of work done in the river, instead of a dock, because it is cheaper; but it cannot be said that a delay for that purpose was within the usual course of vessels moving from one dock to the other.

It appears to me, therefore, that the delay in the river during which the vessel was burnt, was created for a purpose apart from, and independent of, the liberty to go into dry dock, to be repaired there, and then to return, which had been conceded to the assured in the policy, and that the protection of the policy was consequently lost.

LORD O'HAGAN:—

My Lords, I am of the same opinion.

The question is one of construction, and we must endeavour to ascertain from its terms the intention of the parties to the policy of insurance upon this steamship *Indian Empire*. The facts are undisputed, and the words of the policy, if they are literally taken, import merely a contract to insure the ship for a period of three months against loss by fire whilst lying in the *Victoria Docks*, and whilst going into dry dock, according to the liberty specifically granted for that purpose. This is all that the words expressly convey, but I quite concur with the counsel for the Appellant that they imply a liberty to return from the dry dock, and are an undertaking to insure during the transit back again. The real matter for decision is whether the ship, when burnt, was returning to the *Victoria Dock* within the implied meaning of the policy and according to the true contract of the parties?

Now it is found, in the 12th paragraph of the settled Case, that the vessel, having been taken out of the dry dock, was "towed up the river to the Government buoy off *Deptford* about six or seven hundred yards off the *Victoria Docks*, and altogether out of the course from *Lungley's Dock* to the *Victoria Docks*, and there moored for the purpose of having the lower parts of the paddle-wheels replaced." So that we find the vessel removed to the place at which it was destroyed by a course altogether different from that to the *Victoria Docks*, and for a purpose wholly alien from that of returning thither. I feel it impossible to hold that in such circumstances it was covered by a policy which, even assuming that the doubt of one of the ablest Judges of *England* whether the vessel was insured whilst it was passing from the dry dock to the *Victoria Docks* should be, as I think it should be, disregarded, only assured the vessel during that passage. It had made, as I have said, a totally different passage with a totally different object, a passage hundreds of yards from that which should have been followed to get back to the *Victoria Docks*, and with an object—the replacing of the paddle-wheels—quite distinct from that of a return. I do not think that the policy was ever designed to insure the ship in a condition of facts which it does not profess to contemplate, and which, according to the Case, as stated in one clause, the parties to it could not have foreseen.

It is said that such contracts should be construed liberally, and for the interests of commerce; this view has, not improperly, been entertained in certain cases. But it can never justify indifference to the real purpose of a policy, or warrant the recognition of an obligation which was not directly, or by reasonable implication, imposed by its terms, when those terms are fairly interpreted according to their natural and ordinary meaning. Here, the parties were vigilant to specify the risks they undertook, by providing for liberty to go into dry dock and light the boiler fires "once or twice during the currency of the policy"; and we, in my opinion, are not free to add another material condition to their contract, and say that this carefully limited liberty could authorize the taking of the vessel wholly out of the course of passage to the dry dock and back again, with the manifest increase of danger of her destruction. The Case, in clause 18 (1) shews the nature of this increase very clearly—watchmen at all hours, policemen and other persons trained to the use of fire engines, and carpenters ready to scuttle ships on fire, with an ample supply of water, diminished the risks of fire in the *Victoria Docks*; whilst in the river those appliances were wanting, and in the particular case of the *Indian Empire* nearly an hour elapsed between the breaking out of the fire and the arrival of one of the three floating engines, placed at considerable distances from each other, and alone available to control the conflagration which, probably from that delay, resulted in the total loss of the ship. Without discussing the question as to the admissibility of evidence on the one side or the other, these facts are persuasive to shew that the effect of the policy, according to the view of the Appellant, must have been to burthen the Respondents with a liability for risks far more serious than those for which they would have had to answer on their own construction of it; and it is to my mind quite plain that when it was framed such larger risks were not in contemplation of either insurer or insured. Neither of them knew that the width of the *Indian Empire* was too great to allow it to go into the graving dock which was close to the *Victoria Docks*, and both of them had in view the prompt passage to the *Thames Graving Dock* by pontoons and hydraulic pressure, which, if they could have been applied, would have obviated the necessity of taking off the lower half of the paddle-wheels, and removing the ship to *Lungley's Dry Dock*, and would have prevented the unfortunate transfer up the river to the place at which it was burned. They expected a prompt, quick, and safe exercise of the privilege of going into dry dock, and we may assume that the premium was arranged accordingly.

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(1) Which set forth the precautions taken in the *Victoria Docks* to prevent or to extinguish fires.

Can we say that, if the size of the vessel, and the effect of that, in inducing removal first to a distant dry dock, and then to an unguarded portion of the river, far from the *Victoria Docks* had been known, a heavier rate would not more properly have protected the insurer. He might not have accepted the risk at all, or he might have accepted it on terms more favourable to himself and more onerous to the assured.

And on this point we should remember that the vessel might have been brought back immediately and directly to the *Victoria Docks* and refitted there with an avoidance of the greater perils to which I have adverted; but that the Appellant deviated from this proper course, took the ship to a place of danger, and delayed it long upon the river, not from any necessity or difficulty in doing otherwise, but simply to save himself the fourfold expense which would have been incurred by an immediate return to the safer *Victoria Docks*. If he chose to act in this way, and solely for his own apparent advantage, it does not seem unreasonable that the resulting loss should fall upon him, rather than on the insurers who never contracted to sustain it under such circumstances.

The authorities on the subject of usage have been already sufficiently discussed. They do not appear to me to apply to the circumstances before us. The analogy of voyage policies is not a true one, and we must deal with this case according to the contract of the parties. It may be right and reasonable that a usage known to exist, which affects directly the progress of a voyage or the dealing with a mercantile venture, should be held to be contemplated by insurers, and to regulate more or less their liabilities, but it must be a usage not collateral to and unconnected with the voyage which is the subject of insurance. Here the custom of merchants to save money, by refitting a ship in the river rather than in the docks, had nothing to do with the specific contract of the insurer to cover a vessel in the *Victoria Docks*, in the dry dock, and in the passage from the one to the other; he not did cover it in a place different from any of these, to which it had been taken at the assured's own option, and for his own interest.

I think, therefore, that the appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 20th June, 1876.

Solicitors for the Appellant: *Tatham, Oblein, & Nash.*
Solicitors for the Respondents: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
June 22, 23.

3 App Cas
944

THE REV. JAMES ARTHUR GREEN . . . PLAINTIFF IN ERROR;

AND

THE QUEEN ON THE PROSECUTION OF THOMAS TICHMARSH ELLIOTT . . . . DEFENDANT IN ERROR.

Private Act—Common Law Rights—New Parishes—Churchwardens.

As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act of Parliament, and though the particular custom may have been confirmed, years before, by a verdict in a Court of Law.

A parish consisted of four townships or hamlets, *D.*, *W.*, *M.*, and *B.* *D.* contained the parish church, and gave the name to the whole parish. One of the churchwardens of *D.* was appointed by the rector, the other was elected by the parishioners. The two persons who, in the township or hamlet of *M.*, performed the various duties of churchwardens and overseers, were elected by the inhabitants of *M.*, which hamlet raised and administered its rates quite independently of *D.*, and the churchwardens of *D.* proper never interfered, and this custom of election in *M.* by the inhabitants, had been confirmed by a verdict in a Court of Law many years ago. A private Act of Parliament was passed creating *D.* and *W.* into one parish, *M.* into another, and *B.* into a third. The Act contained a provision that when the three parishes had been constituted, the churchwardens of each should be chosen as those of *D.* had been chosen and appointed:—

Held, that though there were no particular words in the Act expressly putting an end to the custom of the inhabitants of the hamlet of *M.* electing the churchwardens, there were words clearly directing something else to be done entirely inconsistent with that custom, which, therefore, on *M.*'s being constituted a parish, ceased, and the rector of the new parish of *M.* became entitled, as the rector of *D.* had always been, to appoint one of the churchwardens, while the other was elected by the parishioners at large, for that the Act had made *D.* the model on which the newly-created parishes were formed, and were to be governed.

THE question in this case depended on the construction of a private Act of Parliament, under which it was contended on the one side that in the newly-created parish of *March*, which had been carved out of the much larger parish of *Doddington*, wherein it had formerly been a hamlet or township, the election of both churchwardens continued in the parishioners at large, and on the other that the rector was entitled to nominate one churchwarden, and the parishioners in vestry to elect the other. The question was raised on an application by Mr. *Elliott* (one of the parishioners) for a mandamus to command Mr. *Green*, the rector, to convene a meeting of the inhabitant ratepayers of the rectory and parish of *March*, for the purpose of electing two fit and proper persons to be churchwardens for the said rectory and parish for the year.

A return having been filed asserting this right on the part of the rector to appoint one of the churchwardens, a formal order was made (by consent of both parties) that the facts should be, without pleadings, turned into a special case. This was done. The case was argued in the Court of Queen's Bench, where, upon the 30th of January, 1874, judgment was given by Justices *Blackburn* and *Archibald* (*diss.* Mr. Justice *Quain*), in favour of the rector. On appeal to the Exchequer Chamber, Barons *Bramwell*, *Cleasby*, *Pollock*, and *Amphlett* (*diss.* Lord *Coleridge*, C.J., and Justices *Brett* and *Denman*) reversed the judgment of the Court of Queen's Bench, and directed that a peremptory mandamus should issue.

The case was then brought up to this House.

The special case set forth the following facts:—

Up to the death of the then incumbent, the Rev. *Algernon Peyton*, in November, 1868, the parish of *Doddington* (otherwise *Dornington*), in the county of *Lincoln*, consisted of the township of *Doddington*, the township, hamlet, or chapelry of *March*, and the hamlets of *Wimblington* and *Benwick*. It was a very large parish, containing almost 37,000 acres, equal to about fifty-seven square miles, with a population of 9200. The township of *Doddington* (which then gave the name to the whole parish), consisted of 7159 acres, *March* of 19,141 acres, *Wimblington* of 7590 acres, and *Benwick* of 3097 acres.

Post 541

In 1847 a private Act of Parliament (10 Vict. c. iii.) was passed, for the purpose of "dividing the parish and rectory of *Doddington* into three separate and distinct parishes and rectories, and to endow the same out of the revenues of that rectory, and for other purposes connected therewith."

The 1st clause provided that upon the death of the Rev.

Algernon Peyton the parish of *Doddington* should be "divided into and form three separate and distinct parishes and rectories, that is to say, the township of *Doddington* and the hamlet of *Wimblington* shall form one separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called the parish and rectory of *Doddington.* The township, chapelry, or hamlet of *March* shall be and form a separate and distinct parish or rectory for all ecclesiastical purposes, and shall be called the parish and rectory of *March,* and the hamlet of *Benwick* shall be and form a separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called the parish and rectory of *Benwick.*"

The 3rd clause provided that when such division should have taken effect, "each of the said three parishes shall for ever thereafter, for all ecclesiastical purposes, be a separate and distinct parish of itself, and shall be a distinct rectory, and that the rector for the time being of each such rectory shall perform all the parochial functions of a minister, in the same manner, and with the same powers, privileges, rights, and immunities, as the present rector of *Doddington* is now by law empowered to do and may be entitled to exercise within the said rectory of *Doddington,* and shall also appoint parish clerks, sextons, and other officers, and have all such other powers in each such parish and rectory as the rector of *Doddington* is now entitled to exercise in the rectory or parish of *Doddington.*"

Clause 5 provided that "two fit and proper persons shall be chosen churchwardens for each such parish, when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of *Doddington,* the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of *Doddington* now exercises."

By clause 6, the Act was not to affect the churchwardens in office when the separation of the parishes should take place, "and the churchwardens of *Doddington* were to continue in office and perform all necessary acts and duties as churchwardens relating to the three parishes, after the separation, until the next usual period of appointing churchwardens." As to this clause of the Act, the case stated that the churchwardens of *Doddington* performed no duties in or affecting *March.*

By clause 8 the clerk and sexton of each of the separate parishes were to be entitled to recover the like fees in each of such parishes as the clerk and sexton of the parish of *Doddington* had before received.

By clause 13, when the separation should have taken place the burial ground of each new parish was to belong to that parish alone, but (clause 15) the inhabitants of *March* and *Benwick* might be buried in the churchyard of *Doddington* without other fees than would have been payable for inhabitants of *Doddington* before the passing of the Act, such privilege to cease after the expiration of twenty years.

By clause 22, on the formation of each new parish two fit and proper persons were to be chosen for each such parish at the same time and in the same manner as churchwardens might then be chosen and appointed for the parish out of which such new parish might have been taken, the rector of such new parish exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the parish out of which such new parish should have been taken might then be entitled to exercise.

By clause 44 nothing in the Act was to make any alteration as to the maintenance of the poor, or any civil purpose relating to the parish of *Doddington.*

At the date of the Act there existed the parish church of *Doddington*, a consecrated chapel at *March*, and a chapel at *Benwick. Doddington* had a graveyard, and so had *March*, and at these two places all the offices of the church, including marriage and burial, were performed; marriages and burials also took place, according to the determination of the parties concerned, in *Doddington* or in *March.* Divine service and christenings and churchings alone were performed at the chapel of *Benwick.*

Each of the four townships made its own poor and highway rate, and had its own overseers of the poor and surveyors of highways. *March* had separate churchwardens, and a church rate. The churchwardens appointed for *Doddington* proper exercised no functions in *March*, nor did those of *March* at all interfere in the affairs of *Doddington*.

The practice of appointing churchwardens in *Doddington* was, that whenever there was a difference one was appointed by the rector and the other elected by the parishioners. In *March*, where, till the Act, there had been no rector, but only a licensed curate, the custom had been for the inhabitants to choose the two churchwardens; and in 1782 that custom was stated to have been established after a litigation on the subject.

The Rev. *Algernon Peyton* died in 1868, and the separation of the parishes having then taken effect, the Rev. Mr. *Green* was presented to the newly-created rectory of *March*.

At a vestry for the parish of *March*, held on the 19th of April, 1870, this question as to the appointment of the churchwardens of that new parish arose, the parishioners insisting that they had by custom the right to elect both churchwardens; the rector, on the other hand, claiming to have, as rector, the right to appoint one of the two, leaving the other to be elected by the parishioners (1).

(1) There was introduced into the Case a license granted, by Cardinal *Wolsey*, to *March*, which was much referred to in proof of the argument that *March* had never been anything more than a mere hamlet of the parish of *Doddington*. The license began thus: " *Thomas*, by Divine mercy Priest of the Order of *St. Cecilia*, of the Holy Roman Church Cardinal, Archbishop of *York*, Primate and Chancellor of *England*, and of the Apostolic See Legate, Bishop of *Durham*, and of the exempt Monastery of *St. Alban's* perpetual Commendatory. And also appointed for life Legate de Latere of the Most Holy Father in Christ, and our Lord the Lord *Clement* by Divine Providence of this name the now Seventh, Pope, and of the said Apostolic See, unto the Most Serene and Potent Prince *Henry* VIII., by the grace of God of *England* and *France* King, Defender of the Faith, and Lord of *Ireland*, the whole kingdom of *England*, and all and singular provinces, cities, lands, and places of the same realm subject thereto, and other places also adjoining that same. For future remembrance hereof, since we deem it enjoined upon us worthily to perform the office of legate, by extending gladly the inclination of our goodwill to those things whereby the increase of Divine worship may be forwarded and the faithful kept from untoward accidents." It then went on to say that "our beloved sons inheriting the village hamlet called *March*, in the diocese of *Ely*," had presented a petition setting forth that " the said village hamlet, which is known to be contained within the parish of the parish church of *Doddington*," is distant from the parish church . . . English miles, and on account of such distance could not without trouble and dangers, especially in winter time, attend at the parish church to hear masses, &c. "And in the same village hamlet is a chapel" consecrated, &c., " under the denomi-

Mr. *Prideaux*, Q.C., and Mr. *McIntyre*, Q.C., for the Appellant:—

The object of the Act was to raise the hamlet of *March* to the dignity of a parish; but it was clear that that parish was to be formed on the model of *Doddington*. The rector of *March* was to be what the rector of *Doddington* had been. Whatever customs might have existed in *March* while *March* was a mere hamlet in the parish of *Doddington* were to be put an end to, and those of the parish of *Doddington*, long established there, were to be substituted for them. The words of the 5th section were express upon this point. The churchwardens of the parish of *March*, the new parish created by the Act, were to be chosen at the same time and in the same manner as the churchwardens of *Doddington* had always been chosen in the parish of *Doddington*. Now what that time was, and what that manner was, were things perfectly well known, and the same clause in the Act gave to the rector of the new parish of *March* the same rights and powers as had been possessed by the rector of the old parish of *Doddington*. That was repeated in the 22nd clause of the Act. The customary

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nation of *St. Wendred the Virgin*," where by ancient custom the inhabitants had heard masses and other divine offices, "and the inhabitants had petitioned for license for a fitting priest for masses and other divine offices and sacramentals every day" (saving otherwise the rights of the said parish church, and without prejudice to the rector of the same). . . "We assenting to such application . . . . do grant and bestow license and faculty to the same inhabitants that they may" [repeating the words of the petition, and repeating also the saving of the rights of the parish church and the rector]. The licence concluded: "And moreover desiring that the same chapel of *St. Wendred* be holden in due veneration and be continually frequented by the faithful in Christ; To all and singular the faithful in Christ of both sexes, truly penitent for and confessed of their sins, who shall on any day visit the same chapel and devoutly say or recite the Lord's Prayer, with the Ave Maria, for the good estate of *Anthony Hansarte*, Esq., and *Alice* his wife, while they are alive, and after their death for the salvation of their souls and all the faithful dead. So often as they shall do this we do mercifully release in the Lord one hundred days of indulgences from the penances enjoined them, and hold them to be released by these presents, confirmed by the affixing of our seal, to be inviolably to be kept for ever in all times to come. Given at our house near *Westminster*, the 3rd day of the month of November in the year of our Lord 1526." (Signed) "*William Clanburgh*, Datarius of the Most Reverend *Clement* the Pope."

H. L. (E.)
1876
GREEN
v.
THE QUEEN.

practice of the township was nowhere recognised as established in the new parish. The 6th section really did not affect the question, for its object merely was to continue in office and in the performance of official duties, the existing churchwardens until the time should arrive for the election of the new officials under the Act. In no way whatever did that section touch the rights of the officers, or their duties, or their mode of appointment. The fact that by other clauses certain privileges of the new parishioners of *March* were continued to them as if they were still parishioners of *Doddington* did not in the least degree affect the question of what were their rights and duties as mere parishioners of *March*.

Those who were called churchwardens of *March* while *March* was still a district of *Doddington*, were not in reality churchwardens, but were chapelwardens of the district. The distinction between the two was great. It was described by Lord *Denman* in *Rex* v. *Marsh* (1), and recognised in *Bremner* v. *Hull* (2), in both of which cases it was shewn that churchwardens, so called, might be elected for each district in a parish; might, *de facto*, so act for each district, and yet would not be churchwardens of the parish. The rectory of *Doddington* was in the 5th clause of the Act made the model for what was to be done in the new rectories, what was to be done was to be on the model of *Doddington*, and in *Doddington* the right of appointing one of the churchwardens was in the rector, while the inhabitants elected the other.

The word "churchwarden" in the Act of Parliament is used in a technical sense, and cannot be applied to the chapelwardens of a mere district within a parish, nor does *Stead* v. *Heaton* (3) establish any such rule as that their merely getting that name is to confer on them the rights which ordinarily belong to it. The chapelwardens of the township of *Bradford* had been always called churchwardens of *Bradford*, which was the name of the whole parish, and payment to them under that name was allowed, though in fact that name did not properly belong to them; but that did not prove that chapelwardens and churchwardens were in law identical officers. Here *March* had merely had a chapel of ease, and before that time, as there was then only the mother church of *Dodding-*

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(1) 5 Ad. & El. 468, at p. 485.
(2) Law Rep. 1 C. P. 748.
(3) 4 T. R. 669.

ton, persons there doing the duties of ordinary churchwardens might of course be called churchwardens of *Doddington*, that is of the parish, without however having the least power or authority, or doing any official acts in *Doddington* itself. In that way in *Craven* v. *Sanderson* (1) the chapelwardens of *Horbury* were spoken of as churchwardens, the chapelry having been coeval in date with the church of *Wakefield*, and for that reason, though only a chapelry, it was held not bound to contribute to the repairs of the parish church. There again the distinction was recognised between persons who in chapelries performed the duties of ordinary churchwardens, but who were not churchwardens. That was in accordance with the judgment of Chief Justice *Holt* in *Ball* v. *Cross* (2), where it was said that a chapelry might be exempt from repairing the mother church "where it buries and christens within itself, and has never contributed to the mother church, for in that case it shall be intended coeval;" which, however, was held not to be so, in fact, there. Nor was it so here; for here it was found that the inhabitants of *March* did sometimes marry and bury in *Doddington*. They must have done so frequently, since in this private Act it had been found necessary to provide for the loss of the fees which the clerk and sexton of *Doddington* would sustain after the separation. The townships were distinct from, yet included in, the parish, and where a township was in all respects except that of contribution to the repairs of the church, independent of the parish, it was not to be considered a parish: *Rex* v. *Justices of the North Riding of Yorkshire* (3); *Rex* v. *Nantwich* (4). Its civil rights may be complete, but that did not affect its ecclesiastical character. In this case the civil rights were secured by the Act.

The license granted by Cardinal *Wolsey* in 1526 shewed clearly that *March* could not set up to be coeval with the mother church of *Doddington*, for at that time *March* had no right of burial, which was an important right of the mother church, and all that was then granted was the license to have masses said and sacraments, and sacramentals administered, and the license contained an express saving of the "rights of the parish church, and without prejudice to the rector of the same." There was therefore no pretence to

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(1) 7 Ad. & El. 880.

(2) 1 Salk. 164.

(3) 6 Ad. & El. 863.

(4) 16 East, 228.

H. L. (E.)
1876
GREEN
v.
THE QUEEN.

claim for *March* that it had, until this Act of Parliament, been in any way entitled to the rights of a parish; and if it now enjoyed those rights, it only did so under this Act of Parliament, and must be subject to those conditions which this Act had imposed. The right of burial was now conferred upon it, and that shewed that that right was not included in the sacramentalia, but must be distinctly conferred on the newly-created parish. The object of the Act was to create three parishes where there had been but one, and to put all three on the same footing of ecclesiastical government, the original parish being taken as the model for all.

The 6th section of the Act really does not affect the question; it merely saves certain civil rights, but in no way affects the rights of the rector as rector, but still leaves him with his full powers such as had been enjoyed before the Act by the rector of the ancient parish of *Doddington.*

Mr. *Bulwer*, Q.C., and Mr. *F. Meadows White*, for the Defendant in Error:—

In the first place, it is to be recollected that this is a private Act of Parliament, and was passed at the instance of the patron and rector, the people of *March* not being parties to it. It is not, therefore, without strong and imperative reasons, to be construed adversely to them. Nor ought any of the rights they enjoyed previous to its passing to be abrogated, except by clear and express words. The general right to choose churchwardens is in the parishioners at large, who are to be at the charge of repairing the church: *Bacon's* Abridgment (1). The weight of the argument on the other side has been thrown on the 5th clause of the Act. What is that 5th clause? It directs that two fit persons shall be chosen as churchwardens. That phrase points directly to a choice by the parishioners, and the churchwardens are to be chosen in the same manner and at the same time as the churchwardens of the parish of *Doddington* were chosen when the Act was passed. The expression there used implied an election by the inhabitants, for that was the only natural meaning of the word "chosen." That description, too, was not restricted to the mere township of *Doddington,* which gave the name to the whole parish, but applied to all the parts of which that whole parish was composed. Now *March* was the most important of those parts, both as regarded extent and population. And at that time the churchwardens of *March* were chosen and appointed by the inhabitants at large. The meaning of the Act was not that what was done in the township of *Doddington* was to be done everywhere else, but that the mode of proceeding which then existed in the various parts of the parish of *Doddington* should be continued in each of them. There was no intention to introduce a new system, and force the observance of one rule in all places. What was then done in each, was to be done in each in future. [LORD O'HAGAN:—The churchwardens of *March* were chosen for the hamlet of *March*, which was not then a parish. They were sworn in at the same time and place as the churchwardens of *Doddington*, but they acted *ex officio* as overseers for *March* alone. That is the statement in the 26th paragraph of the Case.] Exactly so; but what is now asked is to deprive the inhabitants of *March* of the power of making this election. Suppose the separation of the parishes had taken place in the lifetime of the Rev. *Algernon Peyton*, can it be said that he would have had the right to appoint one of the churchwardens of *March?* Certainly not; for that would have been to deprive the inhabitants of *March* of that choice of their own officers which, up to that time, they had been accustomed to exercise. There could not have been any intention in the Legislature to produce such a result.

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(1) Churchwardens (A).

It was found expressly in this case that the churchwardens chosen in *March* acted *ex officio* as overseers of the poor there; the churchwardens of the parish of *Doddington* exercised no functions within the township or chapelry of *March*. The Common Law is, properly, that the churchwardens shall be elected by the inhabitants, and affirmative words in an Act of Parliament do not take away the Common Law: *Com.* Dig. (1); *Co Lit.* (2). An exception to that is introduced where there is an actual disagreement between the inhabitants and the rector; but the passage already cited from *Bacon's* Abridgment shews that that is only by custom, and not only was there no such custom in *March*, but the custom there is directly stated to have been the other way. There never appears to have been such a disagreement in *March*, and the churchwardens there were always elected by the inhabitants. But it is indifferent whether this was originally a local custom or was a Common Law right, for it was expressly established by a verdict at the Assizes in 1782. Being thus doubly established by the uncontradicted custom of the place, and by solemn verdict in a Court of Law, it could only be taken away by the express words of the Legislature. There are no such express words to be found in this Act. The parish clerk is appointed by the parson, but he is a temporal officer, and when improperly removed is entitled to a mandamus to restore: *Orme* v. *Pemberton* (1); *Rex* v. *Warren* (2). In *Rex* v. *Marsh* (3) a parish was divided into four tithings, each tithing elected one churchwarden, and raised its own rates; they were all four spoken of as the churchwardens of the parish, but each acted, with the exception of the annual presentation to the archdeacon, for his own particular tithing; and when the lands of the parish were brought under a local Act and the general Inclosure Act, and the Commissioner made his award, he gave notice of that part of it which affected one tithing to the churchwarden of that tithing only, and it was held that that was right. Where it was intended to make any special provision as to existing matters, that intention must be distinctly expressed. The omission of such expression as to another matter shewed that none was intended. Thus the appointment of the sexton and of the clerk was distinctly provided for, but there was no such special provision as to the appointment of the churchwardens and overseers. That matter was left as it had been before the parliamentary separation of these places, and therefore the custom that existed before the separation ought to prevail, and "the looseness of language," which fell under the censure of Mr. Baron *Cleasby*, ought not to be applied adversely to the general rights of the inhabitants of *March*. As to the license of Cardinal *Wolsey*, it is unimportant for the purpose of deciding this case. It provided a remedy for a particular evil, namely, the great inconvenience to the inhabitants of *March*, in their having to go such a distance for the purpose of taking part in the services of the church. To that extent it treated *March* as a separate parish, and, if so, the custom that prevailed there, and was not altered, must be held to be continuing.

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(1) Parliament, R. 23.

(2) 115 a, and n. (8).

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(1) Cro. Car. 589; and see *Evelin's Case*, Ibid. 551.

(2) Cowp. 370.

(3) 5 Ad. & El. 468.

The difference between the words "appoint" and "choose," on which much stress was laid in the Court below, was really of no importance whatever. They were employed to mean the same thing, and sometimes one only and at another time both together were used, but whether singly or together they really meant nothing but the introduction into office of the two officers who had important duties to perform for the parish for which they were to act, and who, according to the rules of the Common Law and the reason of the thing, ought to be elected by the parishioners at large.

Mr. *Prideaux* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the appeal in this case arises out of a proceeding by way of mandamus, in which the Appellant at your Lordships' Bar, the rector of a parish in the diocese of *Ely*, called *March*, contends that he has the right, in the ordinary way, of appointing one of the churchwardens of the parish. Those who applied for the mandamus, on the other hand, claim that the parishioners have the right of appointing both the churchwardens. That question must be solved by reference to a private Act of Parliament which was passed in the year 1847; and in point of fact to one clause of that Act.

My Lords, the circumstances under which that Act of Parliament was obtained were these. There was in the diocese of *Ely* a very large and well-known rectory, called the rectory of *Doddington*. The proprietor of the rectory at that time was Sir *Henry Peyton*. The rectory was one of very large value, and the area over which it extended was very considerable. It was desirable to obtain parliamentary sanction for the division of that rectory, either with the consent of the then incumbent of the living, or, if he did not consent, after his incumbency should terminate. Accordingly, a local question of property being involved, a private Act of Parliament was obtained. The Act of Parliament effected a division of the rectory, and it contained a saving clause saving the rights of persons who had any proprietary title to the advowson, other than those who applied for the Act of Parliament, who were, I think, Sir *Henry Peyton* and his eldest son. My Lords, like other private Acts of Parliament, that Act tells, upon the face of it, its own history. It narrates the circumstances under which, and the object for which, the Act was sought for and obtained, and I cannot help thinking that much of the difficulty which arose in the Court below, in determining the question now before your Lordships, has arisen from not adverting sufficiently to the narrative given upon the face of the Act of Parliament itself, and from introducing into the case statements of fact, which may be material for some purposes, but which cannot countervail in any way those statements which appear to have been in the contemplation of the Legislature, having regard to what is contained in the Act of Parliament itself.

Before, however, adverting to the Act of Parliament, I will only add that the Judges of the Court of Queen's Bench, before whom this proceeding first came, were divided in opinion as to the construction of the Act. Two of the learned Judges thought that the rector of the parish of *March*—one of the parishes cut off from the large parish of *Doddington*—had the right of appointing one of the churchwardens. The third learned Judge in that Court was of a different opinion, and thought that the parishioners had the right of appointing both the churchwardens. In the Court of Exchequer Chamber the learned Judges were again divided. There were seven Judges then present. Three of the learned Judges were of opinion with the majority of those in the Queen's Bench, that the rector had the right of appointing a churchwarden; four, the majority, were of a different opinion. Your Lordships, therefore, approach the case with the learned Judges below equally divided, five being of opinion that the Appellant was right, and five being of opinion that the Respondent was right.

This private Act of Parliament, which was passed in the year 1847, has a somewhat long recital, but I must ask your Lordships' attention to that recital, because it is the framework of the enactment. In substance, I may say, it states that three divisions were to be made of the parish of *Doddington*. The township of *Doddington* proper, with *Wimblington*, was one, the township of

Benwick was another, and *March* was the third, or rather I should say *March* was the second and *Benwick* the third. The Act recites that "The rectory and parish of *Doddington*, otherwise *Dornington*, in the diocese of *Ely*, in the county of *Cambridge*, comprises the whole of the township of *Doddington*, otherwise *Dornington*, the hamlet of *Benwick*, the hamlet of *Wimblington* and the township, chapelry, or hamlet of *March*, and the income of such rectory is very considerable, and such parish is extensive and populous." Your Lordships will observe that there is one parish spoken of and certain hamlets, and as to one of the hamlets, namely *March*, it is called a "township, or chapelry, or hamlet." The Act recites that the advowson of the rectory and parish church of *Doddington*, with the chapels of *March* and *Benwick*, stands limited and settled to certain uses which put it in the power of Sir *Henry Peyton* and Mr. *Peyton*. It recites that the Rev. *Algernon Peyton* is the rector of the parish church of *Doddington*, with the chapels of *March* and *Benwick*. It recites that the tithes of the rectory of *Doddington* have been commuted, and that there is in the parish of *Doddington* "the consecrated parish church, and also the consecrated chapel at *March*, at which church and at which chapel all the offices of the church have been, and are still, celebrated and performed, and a chapel at *Benwick* within such parish, of the consecration of which last-mentioned chapel no record exists, although Divine service and christenings and churchings have been for many years past celebrated and performed therein, but which chapel has lately fallen down, and is now in a ruinous and decayed condition." Your Lordships again observe that what we find spoken of is one parish, and chapels within that one parish.

The Act then recites that "it is highly desirable for the better religious instruction and pastoral superintendence of the inhabitants of the parish of *Doddington*, that the said rectory and parish should be divided into three separate and distinct rectories and parishes for ecclesiastical purposes, and that each such separate and distinct rectory and parish should be endowed out of the revenues of the present rectory of *Doddington*, and that provision should be made for rebuilding, on an enlarged scale, the present ruinous and decayed chapel at *Benwick* as aforesaid, and for building hereafter an additional church, or additional churches in one or each of such separate and distinct parishes, and for obtaining sites for the additional churches, and forming for each one of such churches a new, separate, and distinct rectory and parish," "and for endowing each such new rectory and parish out of the revenues of either or all of such first-formed rectories and parishes." I am reading this part shortly. It recites that "the purposes aforesaid, however beneficial the same may be, cannot be effected without the aid and authority of Parliament."

Then the 1st clause enacts, "That from and immediately after the present incumbency of the said *Algernon Peyton* shall cease in the said rectory of *Doddington*, or if the said *Algernon Peyton* shall at any time during such incumbency consent thereto in writing," "from and immediately after such consent the said parish and rectory of *Doddington* shall be divided into and shall form three separate and distinct parishes and rectories as hereinafter next mentioned, (that is to say,) the township of *Doddington* and the hamlet of *Wimblington* shall form and be one separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of *Doddington;* the township, chapelry, or hamlet of *March* shall be and form a separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of *March;* and the hamlet of *Benwick* shall be and form a separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of *Benwick:* Provided always, that if the said *Algernon Peyton* shall" consent in writing to the division in part of the parish and rectory of *Doddington* "into one or more of the divisions created by this Act, such consent shall be as valid for the purpose of carrying the division or divisions to which he shall so consent into effect as if he had consented to the formation of the three separate and distinct parishes." The division during the incumbency of *Algernon Peyton* may either be a complete division into three, or one of the new parishes may be formed, or two, according as he may consent. My Lords, I ask your Lordships' special attention to that narrative for the purpose of reminding you that you have here a complete view given you of what was the state of things when the Act of Parliament passed.

There was one *parish* recognised for the purpose of this legislation, and only one; it extended over the whole of the hamlets and chapelries which are mentioned, and it is spoken of as the unit which is to be divided into three parts.

I pass over the 2nd and the 3rd clauses. The 4th clause contains this enactment, that after the division takes effect, either wholly or in part, each of the three parishes with respect to which the division shall take effect "shall, for ever thereafter, for all ecclesiastical purposes, be a separate and distinct parish of itself and shall be a distinct rectory." And then I pass over a good deal of that clause and come to the latter part of it: "The rector for the time being of each parish and rectory formed under this Act, shall, for ever after the formation of such parish and rectory shall have taken effect, be subject to such legal provisions as to presentation," &c., "as are now by law applicable to the said present rector of *Doddington;* and each such new rector shall from the time of such his institution and induction as aforesaid have the like authority and powers over the curates and ministers of the several chapels and churches within his separate parish," "and shall also appoint parish clerks, sextons, and other officers, and shall have all such other powers in each such parish and rectory as the rector of *Doddington* is now entitled to exercise in the rectory or parish of *Doddington*." Your Lordships have therefore put before you the original parish of *Doddington* as the type and example of that which each of the newly-created parishes is to be. Each of the new parishes is to be a parish with all the incidents and all the attributes which the original parish of *Doddington* had, and the rector of each new parish is to stand in all respects in the same position as to the area of the new parish which the old rector of *Doddington* stood in as to the area of the original parish of *Doddington.*

My Lords, it would not have been possible, in any view of the case, to provide, under the general words appointing parish clerks and sextons, for the appointment of churchwardens, because they could not both be appointed by the rector, and a separate provision, in any view of the case, would have had to be made with regard to them. Accordingly your Lordships find a separate provision made as to churchwardens in the 5th and also in the 6th clause; but the 5th is really the clause which must decide the present case. The 5th clause enacts that "when the division of the said rectory of *Doddington* into several parishes and rectories shall have taken effect either wholly or in part under this Act, two fit and proper persons shall be chosen churchwardens for each such parish, when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of *Doddington*."

Now, my Lords, I pause there, "For the parish of *Doddington*," that is to say for the original parish of *Doddington*, two churchwardens were appointed in the usual way, that is to say, by the rector and the parishioners, if they both agreed; if there was a difference the parishioners appointed one and the rector the other. For the parish of *Doddington*, that is to say the original parish of *Doddington*, no other churchwardens were appointed; that is to say, there were no other officers than the two whom I have mentioned, as to whom it could be predicated, before this Act passed, that they were churchwardens for the parish of *Doddington;* and they, as I have said, were appointed one and one. Therefore, if the part of this section which I have read had been placed before any of your Lordships, or any lawyer, upon the statement which I have made, and the question had been asked, What does it mean? I apprehend that there could be no doubt whatever that the answer would be this; it means that in each new parish there are to be two churchwardens, who are to be chosen for the new parish as the churchwardens were chosen for the mother parish of *Doddington*—that is to say, by the parishioners and by the rector.

My Lords, does the rest of the section alter that conclusion, or does it not make it much more plain, if it were possible that it could be more plain? "The rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of *Doddington* now exercises." My Lords, I apprehend that the case would be plain without those words, but those words have absolutely and literally no meaning whatever unless they imply that a reference is made to the mode of appointing the churchwardens of the mother parish, and a recognition is made of the fact that the rector participated in that appointment in the usual way.

I may now pass on to the 6th clause. That clause provides: "This Act shall not be construed to affect any churchwarden, or his rights or duties, who may be in office at the time such formation of the said separate parishes, or either of them, may take place as aforesaid, or any rate or assessment legally made, or to be made, during the continuance in office of such churchwarden as last aforesaid, or the rights or remedies for recovering and enforcing payment of such rates or assessments; and the present churchwardens of *Doddington* shall continue in office and perform all the necessary acts and duties as churchwardens relating to the three separate and distinct parishes and churches as aforesaid, after such division shall have wholly or in part taken effect, until the next usual period of appointing churchwardens." My Lords, again confining myself to the Act of Parliament, and not looking outside of it, I should say that there could be no doubt about the interpretation of this clause. The churchwardens of the mother parish, with whatever rights they might possess, are not to be disturbed, by this division, during their tenure of office. They are during that tenure of office to perform any duties which they could have performed if the Act had not passed, as to every part of the mother parish. It is after the expiration of their tenure of office, after the currency of the year during which they are acting, that the new appointments are to be made for the separate parishes.

My Lords, I will not go through the other clauses at length, but will merely add that there is a compensation provided for the then present clerk of *Doddington* for the loss of his fees by reason of the offices in connection with marriages, from which he derived fees, being after the division performed in the separate parishes. And there is a clause (44) which provides, "That nothing in this Act contained shall make any alteration in the division of the said parish of *Doddington* into townships or divisions for the maintenance of the poor, or in any civil purpose whatever relating to the present parish of *Doddington*." Therefore if it should happen that the parish of *Doddington*, by reason of its division into townships, had the maintenance of the poor cared for, not as a united parish, but by townships or divisions for the maintenance of the poor, that arrangement for civil purposes is not in any way to be affected by the Act of Parliament, the Act being merely for ecclesiastical purposes.

Now, I must repeat that if the question stood merely upon the Act of Parliament, I cannot persuade my mind that any possibility of doubt could arise. The doubt which has arisen has arisen from the facts which are stated to exist outside the Act of Parliament, and which I will now refer to, and having referred to them, I will ask your Lordships whether they can fairly be introduced for the purpose of controlling or affecting the natural construction of the Act of Parliament.

My Lords, the facts which are introduced are with reference to the position of the township of *March*, or if it is properly so to be called, the chapelry of *March*, and to the position of certain officers elected for that township or chapelry styled churchwardens, elected before the passing of the Act of Parliament. My Lords, the statement on that point is this. At the date of the Act "there were" "in the said parish of *Doddington* the consecrated parish church," "and a consecrated chapel at *March*," and a chapel then out of repair at *Benwick*. Each of the two former had a graveyard, and at each of the two former all the offices of the Church were performed. Persons resident within the township of *March* were married or buried in the chapel or in the graveyard at *March*, and persons resident within the rest of the parish and rectory of *Doddington* were married or buried in the church or in the churchyard at *Doddington*, though it occasionally happened that inhabitants of *March* were married or buried in *Doddington*, and inhabitants of *Wimblington* buried at *March*. Divine service and christenings and churchings only were performed at the chapel at *Benwick*. The rector resided at *Doddington*, four miles from *March*, and served the chapel at *March* by a curate, who was nominated by the rector of *Doddington*, and licensed by the Bishop of *Ely* to that duty. In the vestry books and other documents the hamlet or township of *March* is occasionally called the parish of *March*, and the inhabitants described as parishioners of the hamlet of *March*. In the same documents the chapel of *March* is occasionally called the "church of *March*."

Then the Case states that in the eighteenth year of King

Henry VIII. a license was granted by Cardinal *Wolsey* relating to this chapel of *March*. That license is in evidence, and by it Cardinal *Wolsey* takes notice that it had been made known to him that "the village hamlet called *March*, which is known to be contained within the parish of the parish church of *Doddington*" "is distant from the same parish church" so many "English miles, and on account of such distance and other dangers, or risks, it sometimes becomes burdensome to the inhabitants, especially the old and invalids," to journey "to the same parish church of *Doddington* for hearing masses and other divine offices, and receiving sacraments and sacramentals, especially in winter time." And then license is given to the inhabitants of the hamlet of *March* to hear mass at the chapel of *St. Wendred*, and to receive the sacraments and sacramentals there, these words being added, "saving otherwise the rights of the said parish church, and without prejudice of the rector of the same." That license appears to me to put the chapel of *March* very much in the position of what we call a chapel of ease at the present day.

Then the Case states that the parish clerk of *March* was appointed by the rector of *Doddington*. "The sexton of *March* was appointed separately at a vestry of the parishioners of the hamlet of *March*, without any interference on the part of the rector in the choice or appointment of such sexton. The clerk and sexton of *March* respectively alone received fees for marriages and burials, and other services performed within the township and in the chapel of *March*. Neither the parish clerk nor sexton of *March* ever paid a moiety or any other proportion" of those fees "to the parish clerk or sexton" of *Doddington*. Paragraph 21 of the Case states, "The churchwardens of *Doddington* performed no duties in or affecting *March*." Paragraph 22 says, "The chapel at *Benwick* was served either by the rector or his curate at *Doddington*, and in latter years a separate curate was appointed for *Benwick*." Then paragraph 23 states, "The rectory and parish of *Doddington* was not a parish properly speaking in civil matters; each of the townships or hamlets of *Doddington*, *March*, *Wimblington*, and *Benwick* stood alone, each making its own poor-rate and highway-rate, and having its own overseers of the poor and surveyors of highways. The ratepayers of *March* held their own vestry at *March*, and the ratepayers of the other townships or hamlets their own vestry at *Doddington*, as occasion required. The rector of *Doddington* officiated whenever he thought proper at the chapel of *March*. *March* had separate churchwardens, and a church-rate confined to *March*. The church-rates were ordinarily headed as for 'the hamlet of *March*,' and as made by the inhabitants of the hamlet of *March* for the necessary repairs of the church or chapel in the said hamlet. The inhabitants of *Doddington* never interfered in these vestries, but in like manner they held their own vestries at the church at *Doddington*, without any intervention on the part of the inhabitants of the township of *March*. Separate churchwardens were appointed at the latter vestries" (that is to say, the *Doddington* vestries) "by the name of the churchwardens for the parish of *Doddington*. The churchwardens so appointed exercised no functions within the hamlet of *March*. There is only one instance on record of a church-rate being made by the vestry held at *Doddington Church* (viz. in 1736), when it was made for *Doddington* and *Wimblington* only. There were lands called 'town lands' vested in the churchwardens of *Doddington*, the revenues of which were applied to the repairs of *Doddington Church*. The chapel of *Benwick* was formerly supported by voluntary contributions, and latterly it had not been supported at all, and fell down. The Common Law mode of electing churchwardens has always prevailed in the election of churchwardens for the parish of *Doddington*, viz., a joint appointment where there was no difference, and in case of difference, the appointment of one churchwarden by the rector, and the election of the other by the parishioners. At the vestries holden at *March* the custom was for the inhabitants of *March* to choose two churchwardens for that hamlet. This custom was the subject of litigation in 1782, and a trial was had at the assizes for the county of *Cambridge* in that year, which resulted in a verdict establishing the custom. The churchwardens of *March* were always sworn in at the same time and place as the churchwardens of *Doddington*, and acted *ex officio* as overseers of the poor for *March*."

Those, my Lords, being the statements in the Special Case, if your Lordships had to determine what exactly was the legal position of *March*, whether it was a chapelry merely or a chapelry with particular *quasi* parochial rights, considerable argument, perhaps, might be applied, and possibly great care would require to be bestowed as to the proper conclusions to be drawn in law from the facts which I have stated. But, my Lords, I do not think that that is necessary. I take these statements as amounting to this—that there were officers appointed in *March* who were called churchwardens, not churchwardens for *Doddington*, but churchwardens for *March*, and there appears an obvious reason why this was so. The church of *Doddington* had property adequate to its support, and consequently no church-rate was required to be made for the support of the mother church. On the contrary, the chapel at *March* had to be supported, and those for whom it had been set apart as a chapel of ease, naturally and obviously felt it to be their duty to provide for its support; and accordingly a church-rate was made for the hamlet of *March*, and, it must be assumed, was applied by those churchwardens. The hamlet of *March* also maintained its own poor, and those persons who were chosen to be the churchwardens for the hamlet of *March* also acted *ex officio* as overseers of the poor for the hamlet.

Now, these being the facts, as to which there appears to be really no dispute, let me ask your Lordships to consider whether they make any alteration in the construction of the Act of Parliament, which after all must be the guiding rule by which we have to determine the present case.

My Lords, the learned Judges in the Court below who have decided in opposition to the Appellant, apply these facts, as it appears to me, in two ways. In the first place they apply them in the positive construction, if I may use the expression, of the 5th section. And that I will consider in a moment. They also apply them in another way. They say: You have here a custom established in the hamlet of *March* for the parishioners of that part of the parish to choose officers, who are called their churchwardens. That custom they set a value upon to such an extent that in the middle of the last century they had it established by proceedings at law. You cannot suppose (say the learned Judges) that a custom of this kind is to be taken away by an Act of Parliament without express words, and if there are no express words taking away the custom, the custom must be held to remain.

I will say a word upon the second of these arguments first. I have to remark upon it that there is no doubt that, as a general rule, customs or rights of a similar description are not to be taken away by inference or without distinct words. But, my Lords, the error, as it appears to me, which the learned Judges have fallen into upon this point is this. This custom was a custom connected with and attaching to the hamlet or chapelry of *March, quâ* hamlet or chapelry. The Act of Parliament does not continue the hamlet or chapelry of *March*. If it did, it might well be said that incidents of this kind were continued along with it. The Act of Parliament makes, ecclesiastically speaking, a *tabula rasa* of the whole of the ecclesiastical arrangements within the area of the old parish of *Doddington*, and, having made that *tabula rasa*, it proceeds to erect and to create three new well-known and clear ecclesiastical divisions, namely, parishes, or rectories, within the old area; and, creating these three new ecclesiastical divisions, it enacts that each of them is to be created after the pattern or example of the old and entire rectory, and that each new rectory is to have the incidents of the old one. My Lords, it therefore ceases to be a question as to whether a custom attaching to the old chapelry or hamlet of *March* is or is not taken away by express words. The hamlet itself as an ecclesiastical division disappears—the thing is gone—that to which the custom attached is no longer in existence, and therefore that has been done by the Act of Parliament which is much stronger than the abolition of a custom by express words; that is abolished upon which alone the custom could exist, and to which alone it could apply.

My Lords, it only remains to apply the facts thus derived from the Special Case to the 5th section in the way in which the majority of the learned Judges of the Court below propose to apply them. This is the mode in which the Judges of the Court below apply them. I will read again the words of the 5th section: "When the division of the said rectory of *Doddington* into several parishes and rectories shall have taken effect either wholly or in part under this Act, two fit and proper persons shall be chosen churchwardens for each such parish when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of *Doddington*." Now, say the learned Judges who have decided against the Appellant, the meaning of that is this: Your new churchwardens in a new parish (for example, of *March*) are to be chosen in the same way as churchwardens were appointed in any part of the old parish. In the old parish there were churchwardens appointed at *Doddington,* and in the old parish there were churchwardens appointed at *March,* and this is a cumulative expression that new churchwardens are to be appointed throughout the whole area as former churchwardens were appointed throughout the old area. If you find that in one part of the old area churchwardens were appointed in one way, and in another part of the old area in another way, when you make your new divisions, you are in each new division to appoint your new churchwardens as nearly as possible in the way in which churchwardens were formerly appointed in that particular area. That is the argument of the learned Judges. But your Lordships will perceive that that argument proceeds altogether upon a fallacy, or rather, I should say, upon an interpolation into the Act of Parliament of a word which does not occur there, and the excision from the Act of Parliament of a word which is there. The learned Judges substitute for the plain expression, "in the same manner as churchwardens are now chosen and appointed *for* the said parish of *Doddington,*" the words, "in the same manner as churchwardens are now chosen and appointed" *in* "the said parish of *Doddington.*" But what says the Case? The Case, which binds both parties, says: "Separate churchwardens were appointed at the" *Doddington* "vestries by the names of the churchwardens *for* the parish of *Doddington.*" Is it to be said that you ought to alter the wording of the Act of Parliament in this important way, and that having words describing an office in apposite and proper terms "churchwardens *for* the parish," you are to alter that expression, and to say that the expression points to any person who *in* the parish is appointed a churchwarden, although he be not one of the churchwardens *for* the parish, but a churchwarden for *March.* My Lords, nothing could be more violent than that construction.

But what say the learned Judges to the second part of that section? "The rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of *Doddington* now exercises." Say the learned Judges: That means that if the rector has no power, he is not to exercise any power. But if that had been the intention of the Act of Parliament, the expression ought to have been, "The rector of the new rectory of *Doddington* retaining the same right and power in the appointment of churchwardens for that rectory as he now exercises." That would have been a clear and distinct way of expressing what would, according to the supposition, have been meant. The learned Judges absolutely reduce to silence, *quoad March*, the second part of this section, and make it altogether inapplicable.

My Lords, looking at the Act of Parliament apart from the statements in the Special Case, I feel no doubt that the construction does not give to the parishioners the right of appointing both the churchwardens; and looking at the statements in the Special Case, and applying them to the Act of Parliament, I cannot find anything in those statements which should alter the plain and natural construction of the Act of Parliament. I therefore submit to your Lordships that the decision of the Court of Queen's Bench is correct, and the decision of the Court of Exchequer Chamber erroneous, and that this appeal ought to be allowed.

LORD CHELMSFORD:—

My Lords, the case depends entirely upon the meaning of the words of the 5th section of the Act for dividing the parish and rectory of *Doddington* into three separate and distinct parishes and rectories. In construing the Act the object of it must be constantly kept in mind. It was to put an end to the existing parish of *Doddington*, and to create out of different parts of it three entirely new parishes. It was, of course, absolutely necessary to make provision for the performance of parochial functions and the appointment of new parochial officers in the new parishes. The Act evidently intended that the three new parishes should be similar in all respects, unless otherwise provided, and that they should be formed upon the model of the parish of *Doddington*, out of which they were taken. There is nothing throughout the Act to shew that the new parish of *March* was intended to be distinguished in any respect from the other newly-constituted parishes.

But it was argued for the Respondent that, as before the Act, there was a custom in *March* to choose persons who were called (though improperly) "churchwardens," the rector of *Doddington* never interfering in such appointment, the words in the 5th section, "in the same manner as churchwardens are now chosen and appointed for the parish of *Doddington*," must be read as not comprehending *March*, which ought to be regarded as having been intended to be left as to this matter in *statu quo*. But the separate appointment of wardens for *March*, and the non-interference of the churchwardens of *Doddington* with their functions, have nothing whatever to do with the manner of choosing and appointing churchwardens for *Doddington*, which are the words of reference to the appointment of churchwardens in the new parishes; they amount at the utmost to evidence of the extent of the powers and duties of the churchwardens of *Doddington* after their appointment.

Under the Act the old chapelry and township of *March* is put an end to, and it appears to me that everything connected with it in this character, its incidents, privileges and customs, are abolished. And I cannot imagine, if their appointment of churchwardens was intended to be preserved, that this should not have been expressly provided for. A new parish is created instead of the old chapelry, and this must necessarily have the effect of changing its character, in respect at least to parochial officers. A rector, too, is placed over the new parish, who is clothed by the Act with the same powers, privileges, rights and immunities as belong to, and are exercised by, the rector of *Doddington*. Now, there can be no doubt that the rector of *Doddington* had a right to intervene on the choice of churchwardens; and the 5th section of the Act provides for the choice of churchwardens in the manner as they are chosen in the parish of *Doddington*, the rectors of each of the new rectories exercising the same rights and powers in the appointment of churchwarden, as the rector of *Doddington* now exercises.

It is said that this provision is obscure, but I confess it is to my mind perfectly clear. We are referred by the Act to the manner in which churchwardens are chosen in the parish of *Doddington*, and the rights exercised by the rector of *Doddington* in the appointment of them. When these are ascertained (and there is no doubt about them) they are applicable to the new rectories and to the new rectors.

As I have already observed, no separate notice is taken of *March* throughout the Act, which seems to lead fairly to the conclusion that it was intended to be placed as to the appointment of churchwardens and in other respects on the same footing as the other new parishes, all of them being established upon the model of the parish of *Doddington*. The argument for the exception of *March* from the provision as to the appointment of churchwardens is founded merely on implication, which cannot in my opinion prevail against the rights expressly and clearly conferred upon the rector in the choice of churchwardens in the same manner as upon the other newly-created rectors by the 5th section of the Act.

I agree with my noble and learned friend that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD HATHERLEY :—

My Lords, I have come to the same conclusion after hearing the very able arguments of counsel at the Bar, and after very seriously considering the opinions of the learned Judges who have so remarkably differed in their construction of this clause, for the case almost entirely depends upon one clause, namely, the 5th clause of the Act of 1847. From a very early period of the argument it appeared to me that looking at the Act alone, and especially at the wording of the 5th clause, without regarding any of what may be called the accompanying circumstances under which the Act was passed, there could scarcely be any doubt as to what the construction of the Act must be, namely, that it intended that for the future, after the new parishes were constituted, the election and appointment of churchwardens should be such as took place, and had always taken place, in the parish of *Doddington.* But I was struck, I confess, during the argument, also by the observations of the learned Judges to the effect that it was necessary to consider whether any other construction was open, and if so, whether under the circumstances which attended the passing of the Act of Parliament that other construction ought to take effect.

It was urged with considerable force by some of those learned Judges who expressed an opinion contrary to that which I now hold, that this being a private Act of Parliament, passed without the usual summoning of the [persons who might be supposed to take an interest in the passing of the Act, and there having been a litigation some sixty years before the passing of the Act with reference to the election of churchwardens at this very place, *March*—in relation to the controversy which now exists, it could not be supposed that it was the intention of the Act to alter, by indirect means, the rights which had been ascertained and declared as between the rector and the inhabitants as to the appointment of churchwardens; and that if another construction, therefore, could possibly be put upon the clause, that construction was the one which we should be justified in placing upon it, in preference to anything which would appear to work an injustice, on the part of the Legislature, towards persons whose rights had within a comparatively recent period been ascertained after dispute.

Now, my Lords, at that stage of what I was considering I desired to be furnished with a copy of the Act. I knew that in these private Acts of Parliament there is always to be found a saving clause with reference to all persons who are supposed to be interested or capable of having an interest, which the Legislature may possibly not be aware of, and which it is therefore desirous to preserve in the subject-matter of the Act of Parliament. I find in the Act we are construing the usual saving clause which one would expect to find there with regard to all persons interested in the advowson and in the proprietary right which the patron would have in the advowson. Their interests are all saved; but there is another clause which is important as a saving clause, and which shews the scope and frame of the Act in its entirety. That clause is the 44th, by which it is provided, "That nothing in this Act contained shall make any alteration in the division of the said parish of *Doddington* into townships or divisions for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of *Doddington*." The Legislature, therefore, tells you what is intended to be done by this Act, namely, that the Act was passed for what one may call a purely ecclesiastical purpose, and that all civil rights are intended to be in this manner saved; unless, indeed, as might possibly occur, and as it has been argued before us that it may be said in a sense to occur, with regard to the appointment of churchwardens, it should be found that any civil right was affected by the construction which one felt oneself bound to place upon the Act.

And I find in the preamble that which corresponds exactly with the view which I attribute to the Legislature in inserting in the 44th clause a protection of the civil rights of all persons within the parish. The preamble recites, first, that the parish of *Doddington* comprises these different hamlets and townships—I do not farther pursue that part of it; and then it proceeds:—[His Lordship read it, see *ante*, p. 514.]

Therefore one sees that, being passed for ecclesiastical purposes, the object of the Act could not affect prejudicially the civil rights of the inhabitants. It was an Act passed very largely for the benefit of the inhabitants of this unwieldy district, far exceeding both in size and value most of the ordinary parishes in the kingdom. Large benefits are in fact conferred. You find that a provision is made by the bill, with the concurrence of the patron, without whose concurrence, of course, it would not have been done, and with the concurrence of the bishop, for establishing in this large district of *March*, which up to that time had had only a licensed curate residing within the boundary of the townships, and had been as it were separated by a distance of about four miles from the parish church, for establishing in that district, and in a third district which is also created, a permanent and resident rector instead of a licensed curate.

Now, when your Lordships look to another clause in the bill you form some idea of the means which were considered to be required for effectuating these purposes, because although power is given to borrow upon the advowson considerable sums of money for the purpose of erecting a church at *Benwick*, instead of the dilapidated building there, and for the purpose of erecting parsonage-houses both in *March* and at *Benwick*, you find that the Legislature thought fit by the 29th section to set a limit upon the expenditure for these purposes, and that limit is mentioned (taking all the various objects mentioned in the 29th clause together, and adding together the sums of money appropriated to them) at

£1150. What, therefore, was the object of the Act? I think some of the learned Judges scarcely had that sufficiently before their minds. The main object of the Act was the better instruction and better pastoral care of the inhabitants of the whole of this large district, comprising three or four townships, and to provide for that by means of a rector residing in each of the new districts, instead of one rector, superintending, as he had done up to that time, the whole of the larger parish, to provide for his residence there by means of a house which was to be built for him.

Finding that, you are not surprised when you come to the other clauses of the bill to find that in constituting these parishes the Legislature provides that the parishes should be constituted with a system and with a staff—if I may so express it—which should place them in the position of wholly independent new parishes. That accordingly is done. These three districts—*Benwick* township, *Doddington* township (as distinguished from *Doddington* parish), and *March* township—are accordingly by means of the Act constituted into three separate and distinct parishes for all ecclesiastical purposes without the invasion of any civil rights.

That being done, coming to the 5th clause with that view, we must consider, in the first place, its natural meaning, and see if it should by any means be diverted or explained into a somewhat unnatural construction by having regard to the state of circumstances which existed at the time of the passing of the Act. The enactment itself relates to the time when the division into separate parishes shall have taken place. I pass over the fact that there was a power of sub-dividing the new parishes afterwards, which I think can have no bearing upon the point before your Lordships.

The first part of clause 5 does not speak of churchwardens being "chosen and appointed," but says "chosen." But in a subsequent passage the same clause says, "in the same manner as churchwardens are now *chosen and appointed*." I do not think that that difference of expression can be construed as giving any different effect to the first part of the clause as distinguished from the second part. With regard to *Doddington* township proper there never could be any doubt, and there has been none raised in the course of the inquiry, as to the mode of constituting churchwardens, yet that township is included in the phrase "shall be chosen churchwardens." *Doddington* is not omitted there. The mode of constituting churchwardens pointed at in the latter part of the sentence was by means of election and appointment; that is to say, that if the rector and the parishioners agreed they would be appointed, but if they differed the rector would have to appoint one of them and the parishioners to elect the other. The two churchwardens are to be appointed churchwardens for the new parish "at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of *Doddington*."

Now, my Lords, I think upon all the documents (and I do not enter into the detailed statements of the case because they are familiar to your Lordships after this long investigation) it is quite clear that the churchwardens for *Doddington* were the churchwardens whom the parishioners elected in concurrence with the rector, if they did concur, or of whom the parishioners elected one and the rector appointed one, if there was a difference of opinion between him and the parishioners. No other set of people I think, from any part of the case, can be taken to have been churchwardens for *Doddington*. Indeed I asked the question during the argument, although I felt pretty sure that it could be only answered in one way; whether any instance had been heard or alleged of the churchwardens of *March* being called the churchwardens for *Doddington*, or of any other persons whatever being called the churchwardens for *Doddington*, except those who were elected or appointed in what is called the Common Law manner, namely, one by the parishioners and the other by the rector. My own impression, I confess, would be, that notwithstanding the statement in the Case that no instances are found of a *Doddington* churchwarden acting in any way for the district of *March*, notwithstanding the district of *March* being kept separate all through the history of the case from *Doddington*, as far as regards the operation of the churchwardens acting within that range—still, however that may be, or however and whenever that state of circumstances may have arisen, the natural and original course would be that the mother church would have its own churchwardens as churchwardens for the whole of the rectory; that is to say, the whole of this huge parish of *Doddington*. By degrees, no doubt, it might well be that it came to pass that they confined their operations to the township of *Doddington*, because there existed a chapelry in another remote part of this large parish, in which chapelry certain persons were elected to be churchwardens, who appear only to have repaired that chapel and never to have acted, or dreamt of acting by way of making a rate in the general parish of *Doddington*. Nothing of that kind seems to have happened. But, on the contrary, what seems to happened is this—church-rates were rarely made at all (so rarely, that there is only one instance found of them, in consequence of the existence of certain endowments) for the maintenance of the fabric of the parish church of *Doddington*. Whatever may have been the state of the law in the days when church-rates existed, as they did in 1847—supposing it should have been necessary to impose a church-rate then, whether or not the parishioners of *March* could have been compelled to support the parish church of *Doddington*—I have no doubt whatever that when you find the words "churchwardens for the parish of *Doddington*" in the Act, there being nothing to compete with that interpretation, you must take it to mean the churchwardens for the whole parish of *Doddington* as far as their name was concerned, and as far as their original functions were concerned, however much those original functions may have been altered subsequently. At all events, it is clear that whether you take them to have been churchwardens for the whole parish of *Doddington*, or churchwardens for the township, they were not churchwardens for *March* as separate and distinct from the township of *Doddington* proper. Nor certainly were the churchwardens of *March* at any time whatever, either popularly or legally, the churchwardens for *Doddington*. Therefore, the plain interpretation of the clause is only one, that the churchwardens shall be elected as the churchwardens for *Doddington* were.

That, my Lords, is the plain and the only interpretation; and the words which follow appear to me to make it still plainer, because the end of the clause says that the rector of each of the new rectories is to exercise "the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of *Doddington*, otherwise *Dornington*, now exercises." But, my Lords, it appears to me to be plain that that can only point to this, that when the parish is divided into three parts the rights of the rectors of those new districts shall be the rights now enjoyed by the rector of the mother church in respect of the appointment of churchwardens. It seems to me that any other interpretation would be most strained and forced. It would involve this; when a new rector comes in, being appointed under the Act, he would say: I am to act in the appointment of churchwardens because I find that I am directed to act in the same manner and to have all the same rights and powers in the appointment of churchwardens as the rector of *Doddington* had: what right had he? Then, according to the interpretation of some of the learned Judges, from which interpretation I am now differing, the answer would be—None at all: therefore what you are asking is a foolish question; you are to have all the rights which the rector of *Doddington* had, but here, in *March*, the rector of *Doddington* had no rights at all, and those are just the rights that you are to have. That would seem to me to be a very strange and unnatural construction of the Act of Parliament; and he would say, I expected to find that my rights would be defined, and I expected them to find them to be according to this model which the Act sets before me, namely the model of *Doddington;* and the rector of *Doddington* had, at the time the Act passed, namely in the year 1847, this power, under the Common Law right, of appointing one churchwarden in case of differences between him and his parishioners on the subject.

It is said, however, that as you can interpret this clause in a different way, you ought, in the circumstances of this case, to do so. Mr. Baron *Bramwell* undoubtedly puts it very ingeniously—he says: You are to take all *Doddington* when it is divided into its several parts, and say that churchwardens shall be appointed as they have been appointed for the parish of *Doddington,* and in the parish of *Doddington* you find two modes of appointment; the way, therefore, to arrive at a construction which will at once reconcile the existing state of the law, as it had been in comparatively recent times determined, with the provisions of the Act is this. You must construe the Act *reddendo singula singulis;* when you are in this part of *Doddington* it is to be as churchwardens are appointed in this part; when you are in another part it is to be as churchwardens have been accustomed to be appointed in that other part. It appears to me, my Lords, a very violent construction which requires you to apply the principle of *reddendo singula singulis* in this way when you find (and this seems to me to clinch it) that the subsequent termination of the clause says that the rector is to have all the rights and powers which the rector of *Doddington* had. As to construing it *reddendo singula singulis,* if you can apply the phraseology in a rational and sensible manner to each part, then, no doubt, there would be great force in saying that you should take it in its different parts according to what you conceive to be the intention of the Legislature with reference to each of those different parts. But when you find that what you call interpreting on the principle of *reddendo singula singulis* simply strikes out all the last words of the section, which says that the rector is to have all such rights and powers as the rector of *Doddington* had, and in the case of this large third part of the parish you tell the rector that he is to have no right or power in the matter at all: then I think it is evident that you are stretching that construction to an extent to which the clause itself is incapable of being extended, and it appears to me that if we were so to read it we should in fact be making a new Act of Parliament instead of construing the enactment which we find before us in the plain language of the clause.

But, my Lords, I feel the less scruple in coming to this conclusion, because I see no necessity for our endeavouring to strain the construction with reference to the external circumstances to meet this view. A well-known passage from Lord *Coke* has been cited by Mr. Justice *Quain,* namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not co-exist or stand together, then I apprehend you are compelled to come to a construction which is a sensible construction in itself and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words requires, although it may in some degree interfere with what had been done on previous occasions within the same district; the real point of the case being this, that this Act does, for purposes beneficial to all the inhabitants ecclesiastically, subdivide this great parish into three parishes; it constructs each of these new parishes on the model of the old parish, and giving them that construction, it gives them a frame of church government, as far as this question of churchwardens is involved, similar to that which existed in the original parish, which was the mother parish of the whole.

My Lords, coming to the 6th clause, it does not appear to me that any difficulty arises there. The 6th clause not only offers no difficulty in this construction, but in one point of view it seems to me materially to assist us in construing the Act as I propose to construe it. It seems to me to be a saving clause with regard to anything done by the churchwardens anterior to the alteration and the creation of the new parishes. That tends very strongly to shew that the Legislature was aware that it was constructing something altogether new, because if the construction of clause 6 was such as is contended for by the learned Judges whose view I am now differing from, there would have been no necessity to make any saving about the churchwardens of *March* at all. The new rector would have had nothing to do with them with reference to their election, and the Act would simply continue the churchwardens of *March* in their existing position without any new offices or any new ecclesiastical constitution being framed. But it appears to me to be plain that it was intended to have a full ecclesiastical constitution in each of the new parishes, and that that ecclesiastical constitution should be according to the Common Law of the land. That being the case, the churchwardens of *March* would no longer be in the same position as to election as before; there would be a new mode of constituting them, and that being so, it was necessary under the new code to save all such rights as they had until the new system could be arrived at.

As regards the statement in the Case that the churchwardens of *March* had acted *ex officio* as overseers of the poor, I apprehend that no difficulty could arise in that respect. The Act saves all civil rights, and if it be necessary to have an election of overseers of the poor, I apprehend that that election will take place in the ordinary way as it has done hitherto, and no inconvenience will occur. The parishioners may elect the same persons if they like, or they may elect others if they prefer. The question of the election of churchwardens remains untouched by that. I apprehend, my Lords, that the whole scope of the Act remains untouched, the whole scope being to place each of these parishes in a similar position with regard to the election of those officers.

For these reasons, my Lords, I concur in the resolution which has been proposed to your Lordships by my noble and learned friend the Lord Chancellor.

LORD PENZANCE:—

My Lords, after the full discussion which this case has received, and especially after the exhaustive judgment which has been delivered by my noble and learned friend the Lord Chancellor, I should not have thought it necessary to say a word upon the subject if there had not been a division, and so exact a division as there was, between the learned Judges who have considered this matter in the Courts below. And, my Lords, I shall confine myself, in the observations which I address to your Lordships, to one very short and simple point. I may say that I entirely agree with the arguments and statements which fell from my noble and learned friend the Lord Chancellor, and, therefore, I shall forbear from dilating upon the points on which he has dwelt.

The first thing which I wish your Lordships to bear in mind in considering this question is, that the scope and intention of this Act was expressly, on the face of it, limited to the creation of three fresh parishes for ecclesiastical purposes. The words in the statute by which that is made apparent are found in the first clause. It describes the division that is to take place, and it says "that the township of *Doddington* and the hamlet of *Wimblington* shall form and be one separate and distinct parish and rectory for all ecclesiastical purposes." And then follow similar provisions for the other two divisions, into which the original parish is cut up. Then in two subsequent clauses, which have been referred to by your Lordships, clause 42 and especially clause 44, it is distinctly provided in the negative "that nothing in the Act contained shall make any alteration in the division of the parish of *Doddington* into townships or divisions for the maintenance of the poor or in any civil purpose whatsoever relating to the present parish of *Doddington.*" It is, therefore, plain, both by way of affirmative and negative words, that the scope of the Act is limited to the creation of three parishes for ecclesiastical purposes; and whatever rights the inhabitants of the four townships which existed within the parish had at the time of the passing of the Act in relation to the maintenance of the poor, in relation to choosing officers who should regulate that maintenance or take an active part in that regulation, whatsoever rights the inhabitants had in any civil purpose or office whatever, as attaching to the separate townships, the Act carefully preserved to them.

My Lords, bearing that in mind, the short question is, what did the Legislature mean when it said that the churchwardens should be chosen in each of the new parishes "at the same time and in the same manner as churchwardens are now chosen and appointed for the parish of *Doddington?*" On the face of them, these words would not appear to carry with them any ambiguity whatever, because a parish is an old ecclesiastical division of land, and one understands what the meaning of appointing churchwardens for a parish is. One would have thought, therefore, upon the face of the statute, that there would be no difficulty, because one would only have to inquire what was the method which had prevailed in appointing churchwardens for the parish, and at once the description in the Act of Parliament would be satisfied. But in this particular case a controversy arises upon that question, and the difference which has taken place in the Courts below amongst the learned Judges is a difference in the view which they take of the meaning of the words "appointed for the parish of *Doddington.*"

Now, my Lords, what are the facts, for it is upon the conclusion to be drawn from the facts as they existed in the parish at the time the statute passed that any difference arises? At the time when this statute passed there was a manner of choosing churchwardens for the parish of *Doddington*—it is so found in the Case—"The inhabitants of *Doddington* never interfered in these vestries" (that is, the vestries of *March*), "but in the like manner they held their own vestries at the church at *Doddington* without any intervention on the part of the inhabitants of the township of *March.*"

Separate churchwardens were appointed at the latter vestries by the name of the churchwardens for the parish of *Doddington.* And then, again, lower down in paragraph 25, the Case states: "The Common Law mode of electing churchwardens has always prevailed in the election of churchwardens for the parish of *Doddington.*" The Case, therefore, states that there was a mode, which is said to be the Common Law mode, of electing churchwardens for the parish, and it states that churchwardens were appointed at certain vestries by the name of churchwardens for the parish of *Doddington.* This, upon the face of it, would seem to satisfy the description that we are in search of, in order to give effect to the Act of Parliament.

But then it is said: Yes, these people were appointed by the name of churchwardens for the parish; but in point of fact they were not churchwardens for the parish; they were churchwardens for a limited portion of the parish only. As I understand the argument, it comes to that. Now, my Lords, this brings me to the point upon which I wish your Lordships' particular attention, because I think sufficient attention has hardly been directed to it. In my judgment they were not merely in name, but they were in substance and in fact churchwardens for the whole parish. The church was in the township of *Doddington.* The inhabitants of that portion of the parish which was called *March,* being at some little distance from the parish church, had a chapel at which they used to attend, and, practically, I dare say, they did not attend the parish church of *Doddington.* But, although saying nothing as to which church the inhabitants were in the habit of attending Divine worship in, the Case finds that the offices of the church were performed at the parish of *Doddington* and at the chapel of *March,* and that "persons resident within the township of *March* were married or buried in the chapel or in the graveyard at *March,* and persons resident within the rest of the parish and rectory of *Doddington* were married or buried in the church or in the churchyard at *Doddington,* though it occasionally happened that inhabitants of *March* were married or buried in *Doddington,* and inhabitants of of *Wimblington* buried at *March.*" Therefore it is found, upon the face of the Case, that practically the inhabitants of *March* did occasionally use the churchyard and the church at *Doddington* as parishioners. And, my Lords, whether they did or whether they did not, I am quite unable, from anything which is to be found upon the face of the Case, to come to the conclusion that they had lost their legal right to do so. *March* was within the legal parish of *Doddington;* the inhabitants of *March* were parishioners of *Doddington;* it seems to me that they were entitled to all the services of the Church and to every right of the parishioners of *Doddington.* If that be so, the persons who were appointed churchwardens for the parish of *Doddington,* at a vestry held at *Doddington,* appear to me to have been in fact and in substance, as well as in name, churchwardens for the parish. If so, as I said before, that entirely satisfies the words of the section we have to construe.

Now let me examine whether there was any one else who could satisfy that description. The only other mode of election which the Case discloses was a mode of electing certain persons as churchwardens for *March.* What does the Case say as to the position which those persons held? Paragraph 26 says: "At the vestries holden at *March* the custom was for the inhabitants of *March* to choose two churchwardens for that hamlet." Therefore the churchwardens of *March* were chosen as for the hamlet of *March,* and by no stretch of language, as it seems to me, could they be held in any sense to be churchwardens for the parish. There, therefore, was at the time this Act passed a mode of electing churchwardens who were churchwardens for the parish in substance as well as in name; and there was another mode of electing churchwardens who were not churchwardens for the parish, but only for the hamlet of *March.* I say it is impossible to put those together and to say that those four persons together are the persons who are meant when the 5th section says that the manner of electing and appointing the churchwardens for the parish of *Doddington* is to become the manner of electing and appointing churchwardens in future for the new parishes. The other construction, the one already placed upon the clause, seems to me upon the face of the Act of Parliament perfectly to satisfy the provisions of the Act and, as I should say, to leave it without anything that may be called reasonable ambiguity.

Now, my Lords, why is that to be departed from? The proposition upon which my judgment is founded in respect of construction is this—if you have a thing described in a statute, and you

H. L. (E.)
1876

GREEN
v.
THE QUEEN.

find upon applying that description to the existing facts, that there is one set of facts or circumstances, one person or one thing as the case may be, which amply, fully, and entirely satisfies the description which the statute gives, then you have no right, upon any surmise as to what the Legislature intended, to depart from that simple description, to go away from the words of the description itself, and to amplify them or vary them until you have included some set of circumstances, some other set of persons, or bodies, or things, which under that amplified form will come in under the description. I say that it is a principle of construction that no such thing should be done, subject to this—that if upon the face of the Act of Parliament you find that giving the ordinary sense and meaning to the words, you are involved in some inconsistency in any of the other clauses, it may then be necessary to search about and see whether the palpable and obvious construction which the words point at, may not be varied in order that that inconsistency may be avoided. But there is no such inconsistency here. It is not suggested that this creates any difficulty whatever except this: It is said, if you give this meaning to these words, which is their plain and natural meaning, you will then be depriving the inhabitants of *March* of some legal right which they had at the time when the statute passed, and that you ought not to do that without precise words. My Lords, it is obvious that that argument does not go far enough, if I am right in the canon of construction to which I have just alluded. But, in point of fact, there is no such right taken away. My noble and learned friend the Lord Chancellor has already pointed out that the right of election was one which attached before to the hamlet of *March* for the civil purposes of the township, and that this Act, which is confined to *ecclesiastical* purposes, really has not upon the face of it, either expressly or impliedly, taken away that right. Under those circumstances, the plain words of the statute are amply satisfied, in my opinion, by the state of facts which existed at the time of the passing of the Act, and the mode of choosing the churchwardens for the parish of *Doddington* must be intended to mean, and must mean only, that mode which was in existence of choosing the only persons who satisfied the description of being churchwardens of the parish.

H. L. (E.)
1876
GREEN
v.
THE QUEEN.

LORD O'HAGAN:—

My Lords, it was my purpose to make some observations, but the case has been so exhaustively treated already, that I think I should only waste time by so doing. I agree with my noble and learned friend the Lord Chancellor, that upon the statute *per se* no question could really arise at all. The construction of it would plainly lead to the view contended for by the Appellant.

As to the question which does arise upon the findings of the Case with reference to the custom in *March*, I felt some difficulty in my mind, I confess, during the course of the argument. The judgment which we are about to pronounce will not really affect the civil rights of this parish at all. As was pointed out by my noble and learned friend who last addressed your Lordships, the civil rights of these parishioners are preserved. As to their ecclesiastical rights, as to the churchwardenship connected with ecclesiastical affairs, they have all that the Common Law could ever have given them. The rector of the parish will derive from your Lordships' judgment nothing that the Common Law would not have given to him, and nothing that in my opinion ought not to be legitimately and properly given to every rector for the purpose of governing his parish. And finally, my Lords, if these parishioners lose anything, it must be remembered that they lose what existed before in a very limited way, getting very good consideration and compensation for that loss, and that they have derived permanent advantages, as pointed out by my noble and learned friend opposite (Lord *Hatherley*), in their perfectly independent parishes, advantages formerly purchased at a very great expense. That appears by the Act of Parliament itself. Therefore they are no losers upon the whole transaction.

I am therefore of opinion that the resolution which has been proposed by your Lordships ought to be passed.

Judgment of the Court of Exchequer Chamber reversed, and judgment entered for the Defendants, with costs.

Lords' Journals, 23rd June, 1876.

Solicitors for Appellant: *Garrard, James, & Wolfe.*
Solicitors for the Respondent: *Meredith & Co.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
June 23, 26.

MANUEL MISA . . . . APPELLANT;

AND

RAIKES CURRIE, G. GRENFELL GLYN, AND OTHERS . . . . RESPONDENTS.

Draft—Bill payable on Demand—Stamp—Consideration—Sale of Bills for Abroad.

lhl53/201

A draft drawn for the amount of bills of exchange, purchased for transmission abroad, which amount by the usage of bill brokers is due on the first foreign post-day next after the purchase, and which draft was dated as of that day, is an order for the payment of money on demand, and under the 33 & 34 Vict. c. 97, falls within the description in the schedule to that Act, "Bill of exchange, payable on demand," and is sufficiently stamped with a 1*d.* stamp.

Such a draft or order made by a person who has sold the bills, and addressed to the purchaser of them, constitutes a valuable consideration for a cheque given by the purchaser of the bills.

It does so, though the bills sold may be dishonoured when due.

L., then in good credit in the City, sold to *M.* four bills of exchange, drawn by himself upon *P.* at *Cadiz.* They were sold on the 11th of February, and by the custom of bill brokers were to be paid for on the first foreign post-day following the day of the sale. That first day was the 14th of February. *L.* was much in debt to his banker, and being pressed to reduce his balance, gave to the banker a draft or order on *M.* for the amount of the four bills. This draft or order was dated on the 14th, though it was, in fact, written on the 13th, and then delivered to the banker. On the morning of the 14th the manager of *M.*'s business gave a cheque for the amount of the order, which was then given up to him. *L.* failed, and on the afternoon of the 14th the manager, learning that fact, stopped payment of the cheque:—

Held, that the banker was entitled to recover its amount from *M.*

THIS was an appeal, under the *Common Law Procedure Act*, 1854, against a judgment of the Exchequer Chamber, which (*diss.* Lord *Coleridge*, C.J.) had affirmed a previous judgment of the Court of Exchequer.

The Respondents were bankers in *London*, and were Plaintiffs in an action which they brought against the Defendant to recover a sum of £1999. 3*s.*, under the following circumstances:—

F. De Lizardi, trading under the name of "*Lizardi & Co.*," carried on an extensive business, and dealt largely in bills upon foreign countries. The Plaintiffs had for years been the bankers of *Lizardi*, who had a high credit in the City. *Lizardi* had two accounts with the Plaintiffs; one a loan account, the other a drawing account, and up to a late period in 1872 had usually a considerable balance in the Plaintiffs' hands. Early in 1873 *Lizardi* got into money difficulties, and in February of that year was indebted to the Plaintiffs in the sum of above £83,000, of which about £49,000 were due on the loan account, and above £34,000 on the drawing account. There were considerable securities deposited with the bankers to meet this debt, but Mr. *Currie*, one of the banking firm, entertaining very strong doubts as to the value of these securities, was urgently pressing *Lizardi* to reduce the balance.

Among the persons with whom *Lizardi* had transactions in business was Mr. *Misa*, the present Appellant. Early in February, 1873, *Misa* was at *Jerez*, in *Spain*, and desiring to send thither a remittance from *London*, he, on the 11th of February, telegraphed to Mr. *Pritchett*, his general manager in his *London* business, to purchase from *Lizardi* bills on *Cadiz* to the value of about £2000. *Pritchett* accordingly instructed *Misa's* ordinary bill broker to obtain such drafts from *Lizardi*. This was done, and, on the 11th of February, 1873, a clerk of *Lizardi* left at *Misa's London* office four drafts drawn by *Lizardi* in the name of *Lizardi & Co.* upon Mr. *Manuel F. Paul*, of *Cadiz*, amounting altogether to £1999. 3*s.*, and payable at fifteen days' date. These drafts were forwarded by the evening post of that day to *Misa* at *Jerez*. It is customary in the *London* money market to pay for bills, drawn on persons in foreign countries and obtained in *London* through a bill broker, upon the first post-day occurring after the purchase of the drafts. The post-days are Tuesday and Friday. The purchase of these drafts having been made on Tuesday, the 11th of February, the payment for them therefore became due on the following Friday, which was the 14th of February. On the 12th of February *Lizardi* was much pressed by Mr. *Currie* to reduce the balance of the debt owing to the bankers, and on the 13th of February *Lizardi* paid into the Plaintiffs' bank, to the credit of his drawing account, the sum of £6925, in two cheques of £6500 and £425, and, on the

H. L. (E.)
1876
MISA
v.
CURRIE.

Post 567

same day, he handed to Mr. *Currie* the following document, which was partly printed and partly written (1), and was impressed with a penny stamp.

> "*M. Misa, Esq.,* *London,* 14 Feb., 1873.
> "41, *Crutched Friars.*
>
> "Please to pay to Messrs. *Glyn, Mills, & Co.*, or bearer, the sum of *nineteen hundred and ninety-nine pounds three shillings*, for bills negotiated to you last post.
>
> *£1999 3s.* "*F. De Lizardi & Co.*"

The words "for bills negotiated to you last post" referred to the four drafts sent to *Misa* at *Jerez;* but the Plaintiffs did not know what they meant, and assumed them to describe regular bills sold by *Lizardi* in the usual way of his business, and, if so, it was usual to draw in that way on the purchaser of the bills for the amount, and sometimes, but not always, a draft of that kind was treated by the purchaser as a bill of exchange, and the word "accepted" was written across it.

On the 13th of February bills drawn by *Lizardi* in favour of other persons were presented to the Plaintiffs' clerk at the clearing house, to the amount of above £8000, but were by him, on instructions received from his house, refused to be passed.

On the morning of Friday, the 14th of February, a clerk of the Plaintiffs left at *Misa's* office in *London* a notice, partly printed and partly written, in the following words:—

> "A bill on *M. Misa,*
> "For *£1999 3s.*,
> "Drawn by *De Lizardi & Co.*,
> "Lies due at
> "Messrs. *Glyn, Mills, & Co.*,
> "No. 67, *Lombard Street.*
> "Please to call between the hours," &c.

Between two and three o'clock of that day, the 14th of February, the Plaintiffs sent one of their messengers to *Misa's* office with the draft drawn by *Lizardi* on *Misa*, to inquire if it would be paid. Mr. *Pritchett* said that it would be paid, expressed wonder at the question, and offered to give a cheque for the amount, which the messenger did not take, as he had not received authority or instructions to do so. About an hour afterwards Mr. *Pritchett* drew a cheque on *Barnett, Hoares, & Co.* (*Misa's* bankers) for the £1999. 3*s.*, which cheque was in the afternoon handed in to the Plaintiffs, who thereupon delivered up, to the messenger bringing the cheque, the draft of *Lizardi* on *Misa.* The amount of this cheque was then entered in the Plaintiffs' books to the credit of *Lizardi.* The Plaintiffs at once sent the cheque to the clearing-house, and presented it for payment; but in the meantime, Mr. *Pritchett* having heard that *Lizardi* had stopped payment, sent to *Barnetts & Co.* that the cheque he had drawn in favour of the Plaintiffs was to be stopped. It was stopped. *Lizardi* afterwards absconded. On being declared a bankrupt, it was found that his liabilities amounted to upwards of a million sterling—his assets were very small. The four drafts he had drawn on *Manuel Paul* at *Cadiz,* payable on the 25th of February, and which had been sent to *M. Misa,* were, on presentation for payment, dishonoured.

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(1) The words and figures in both this and the following document which were in writing are here printed in Italics.

The Plaintiffs brought an action against *Misa* on the cheque as a cheque payable to *Lizardi* "or bearer," of which they alleged they "became bearers." The Defendant pleaded: 1. That the Plaintiffs were not the bearers of the cheques as alleged; 2. That he made the cheque through the fraud of *Lizardi,* who delivered the cheque to the Plaintiffs to hold as his agents, and not as bearers and transferees thereof, and that it was presented for payment by them as his agents, &c.; 3. That there never was any value given to the Defendant for the cheque; 4. That the Defendant made the cheque through the fraud of *Lizardi,* and that the Plaintiffs never gave value, &c.; 5. That there never was any value given for the cheque, and that the Plaintiffs held the same without having given value or consideration for the same. The Plaintiffs demurred to the 3rd plea, and joined issue as to the others. Joinder in demurrer. Issue.

The cause was tried before the Lord Chief Baron at the sittings after Michaelmas Term, 1873, when the points of the defence were, that there was a total failure of consideration as between *Misa* and *Lizardi,* and also that the Plaintiffs were not holders for value. The learned Judge, on the evidence above stated, directed a verdict for the Plaintiffs for £2090, the amount of principal and interest, but gave the Defendant leave to move to enter a nonsuit. A rule was accordingly applied for in Hilary Term, 1874, but was, on shewing cause, discharged. The case was carried to the Exchequer Chamber, and the judgment was affirmed by Justices *Keating*, *Lush*, *Quain*, and *Archibald*, Lord *Coleridge*, C.J., *diss.* (1). This appeal was then brought.

Mr. *Watkin Williams*, Q.C., and Mr. *Wood Hill*, for the Appellant:—

There was a total failure of consideration as between *Misa* and *Lizardi* for the paper which *Lizardi* gave to the Respondents. *Misa* never received any value for his draft except the four bills, which were dishonoured. The consideration for the draft was the sending of the money to *Cadiz*—no money was sent, nothing was sent but valueless pieces of paper, so that if *Lizardi* had brought an action on the original order *Misa* would have had a complete defence to it on that ground. *Lizardi* could not, by merely transferring the draft, make it a better security or give it a higher title than belonged to it in his hands. The remedy on it was suspended till the four bills were duly honoured. It was not a bill of exchange, nor a promissory note, nor an order for the payment of money on demand, and gave no title to *Lizardi* to sue upon it until the bills, for which it had been given, had been honoured. His transferees stood in no better position than he did in respect of such an instrument; besides, they had not given any fresh credit, or advanced any money on account of it. The existence of a past debt was no sufficient consideration. The bankers were in fact merely *Lizardi's* agents to collect the money mentioned in the paper given to them by *Lizardi*, and so could not recover upon it: *De la Chaumette* v. *Bank of England* (2). The fact that *Lizardi* owed the Respondents a considerable debt at that time did not constitute them holders of this document for value; and it was not, in itself, a complete bill of exchange, or a promissory note, or a draft for payment of money on demand; it, therefore, was not a negotiable instrument so as to amount to a *pro tanto* payment of his debt. The

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(1) Law Rep. 10 Ex. 153.

(2) 9 Barn. & C. 208.

H. L. (E.)
1876
MISA
v.
CURRIE.

Respondents were *Lizardi's* bankers, so that, whatever was the legal character of the instrument, their only duty was to get in the money and to place it to his account. The cheque, which was given to the Plaintiffs by *Misa's* clerk, for which the original document was sent back, was therefore a cheque given entirely without consideration as between *Misa* and the Plaintiffs, and they had no valid title to enforce it. There could be no enforcement of the order for payment of the amount of the bills until the bills had been honoured. Till that time any remedy against *Misa* was suspended, he could not be said to owe any debt to *Lizardi*, and *Lizardi's* order for payment of their nominal amount was therefore an order made without legal consideration. In no way whatever was the original document of any value. It was not properly stamped.

[As this was a point which had not been argued in the Court below, the objection was taken that it could not be introduced here. But it was answered that no new matter was proposed to be now introduced into the case, that the objection arose upon matter which was before the Court below, though this particular argument upon that matter was not there presented for consideration, and that consequently it might properly be discussed here; and the cases of *Withy* v. *Mangles* (1), *Bain* v. *Whitehaven Railway Company* (2), *Marquis of Bristol* v. *Robinson* (3), and *Fitzmaurice* v. *Bayley* (4), were referred to. The argument was allowed to proceed.]

The original document was not a bill of exchange, a promissory note, or a draft for payment of money on demand within the provisions of the 33 & 34 Vict. c. 97, and the schedule thereto, and consequently was insufficiently stamped (ss. 48–49), and not only could not be used for any purpose whatever, but subjected the person who proposed to use it to a penalty under the 54th section of that statute. [THE LORD CHANCELLOR:—You say that the instrument was void under that statute, and being so void, could not, even constructively, constitute a valid consideration for the cheque sent by *Pritchett.*] Certainly. It was an instrument actually post-dated; it was given on the 13th and was dated on the 14th; it was payable therefore on the day after it was given, and could not be said to come within the description of any of the instruments mentioned in the statute on which this small duty was payable.

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(1) 10 Cl. & F. 215.
(2) 3 H. L. C. 1.
(3) 4 H. L. C. 1088.
(4) 9 H. L. C. 78.

Mr. *J. Brown*, Q.C., and Mr. *Murray*, for the Respondents:—

There was value—there was good consideration—given for the document originally put into the hands of *Glyn & Co.*, and that document was really an order for money payable on demand. *Lizardi* was greatly in debt to his bankers; they pressed him to reduce the amount of his debt, and he paid in this instrument as something of value to reduce that debt. The right to sue *Misa* for the price of the bills arose at once, and was not dependent on the bills being honoured. [THE LORD CHANCELLOR:—Their argument is that the original instrument was a mere direction to the bankers to collect the amount therein named, to be put to *Lizardi's* credit in his account with his bankers; but that it was not a payment to them.] That argument cannot be sustained—it is contradicted by the facts. He was in debt; they pressed him for payment of at least a part of his debt; he gave this instrument as part payment; it was received as in part payment, and the moment it was ascertained that it would be paid it was treated as a part payment. It was in form an order for payment of money on demand, and stated the sale of bills as the consideration for which the payment by *Misa* was to be made. As to the Plaintiffs in whose favour it was drawn, it was a perfectly valid order for the payment of money made upon a perfectly valid consideration. As to the date, no objection would arise on that; the money, by the well-known course of business, was not due till the 14th, and the order was therefore properly made payable on the 14th. It was consequently a draft payable on demand, and was therefore under the very words of the schedule to the statute, a "Bill of Exchange" (which words are used in the schedule as synonymous with a draft payable on demand), on which a stamp of 1*d.* is alone chargeable.

It was valid for all purposes, but even if it had not been in itself enforceable, *Williams* v. *Jerratt* (1) established that under the Stamp Acts the time means the time expressed on the face of the bill, and not the time when it is actually issued, and though upon a wrong stamp, it would still have been admissible in evidence to shew the state of dealings between the parties. This was payable to bearer, and according to *Whitlock* v. *Underwood* (2) a draft or note payable to bearer generally is in law payable on demand, and if so, the stamp here is quite sufficient: *Byles* on Bills (3). As to the right of a *boná fide* holder, Lord Chief Justice *Cockburn*, in *Watson* v. *Russell* (4), stated the law to be now quite settled that (5) "if a person puts his name to a paper, which either is, or by being filled up or indorsed may be, converted into a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder for consideration and without notice, such party is liable to such *boná fide* holder, however fraudulent, or even felonious, as against him the transfer may have been." *Foster* v. *Pearson* (6) had proceeded on the same principle. A post-dated cheque, payable to order, is not illegal: *Emanuel* v. *Robarts* (7). Here, if this cheque was post-dated, it was payable to order; but it was not post-dated—the money was due on the day of the date. All that any of the Stamp Acts have required is that a cheque, whether post-dated or not, shall be stamped. The order for payment of money given in this case was stamped in accordance with the 33 & 34 Vict. c. 97, schedule "Bills of Exchange," and formed a perfectly valid consideration for the cheque which was given to redeem it.

Even *Lizardi* himself was not bound to wait till the time arrived for honouring the bills. His title to claim the value of what he had sold arose. The time for payment of the purchase-money had arrived on the 14th, and the *boná fide* holders of his order for payment were entitled to the money at once. The honouring of the bills and the payment of the price for them, were not mutual and

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(1) 5 B. & Ad. 32; see also *Austin* v. *Bunyan*, 6 B. & S. 687; and *Bull* v. *O'Sullivan*, Law Rep. 6 Q. B. 209.

(2) 2 Barn. & C. 157.

(3) 9th Ed. p. 204.

(4) 3 Best & S. 34, at p. 40. 9 Jur. N.S. 251

(5) Ibid. at p. 40. 9 Jur N.S. 251.

(6) 1 Cr. M. & R. 649; 5 Tyr. 255.

(7) 9 Best & S. 121.

H. L. (E.)
1876
Misa
v.
Currie.

dependent considerations: *Pordage* v. *Cole* (1); *Roberts* v. *Brett* (2). Unless deposited for a particular purpose, bills left at a banker's are subject to the banker's general lien: *Brandao* v. *Barnett* (3); and being so subject become valid securities in the banker's hands to be disposed of for his benefit. Here the original paper was not left with the bankers for a particular purpose, but was deposited as a security for payment—it was a security actually due—and it was given up on the sending of the cheque, and the title of the Respondents is therefore complete.

Mr. *Williams* replied.

Lord Chelmsford:—

My Lords, the question upon this appeal is whether the Respondents, Messrs. *Glyn & Co.*, are entitled to recover from the Appellant, *Misa*, the amount of a cheque for £1999. 3*s.* drawn by him on his bankers, Messrs. *Barnett, Hoare, & Co.*, in favour of *Lizardi & Co.* or bearer. The following are the material facts of the case:—[His Lordship stated them.]

Upon these facts the Court of Exchequer held that *Glyn & Co.* were entitled to recover, and, upon appeal, the Judges in the Exchequer Chamber, with the exception of the Lord Chief Justice of the Common Pleas, agreed in that judgment.

Upon the argument at your Lordships' Bar the Appellant contended: 1. That there was a failure of consideration between *Lizardi* and *Misa*. 2. That Messrs. *Glyn & Co.* were not holders for value of the cheque sued on, but were merely collecting the money for *Lizardi* as his bankers.

In support of the first proposition it was argued by Mr. *Watkin Williams* that the true character of the contract between *Lizardi* and *Misa* was, that *Lizardi* should transmit a sum of £2000 to *Cadiz* for *Misa*, and that *Misa* would pay *Lizardi* £1999. 3*s.* fifteen days thence—that *Lizardi* not having sent the money there was a total failure of consideration for *Misa's* cheque. It appears to me that this is an entire misapprehension of the nature of the contract, which was nothing else but a purchase of bills by *Misa* from

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(1) 1 Wms. Saund. 319 h.

(2) 11 H. L. C. 337.

(3) 12 Cl. & F. 787.

Lizardi. The statement in the Special Case is that *Misa's* agent effected a contract between *Lizardi* and *Misa* for the sale and delivery by *Lizardi* to *Misa* of drafts to the amount of about £2000 sterling at an agreed rate of exchange from *London* to *Cadiz*, payable at fifteen days date. All these conditions were punctually complied with, and *Misa* received precisely what he bargained for, and there is nothing to shew whether he continued to hold the bills or passed them to other parties. It was however alleged that the whole transaction was a fraud on the part of *Lizardi* from the beginning, and that when he drew the bills he knew that he had no effects in *Paul's* hands, and therefore that the bills would not be paid. Unless such original fraud on the part of *Lizardi* can be proved the contract is binding. But there is no proof that *Lizardi* knew, when he drew upon *Paul,* that the bills would not be paid. In *Paul's* protest he does not say that he has no effects of *Lizardi's* in his hands, but that he has no realized effects. And it is not unlikely that the other reason assigned in the protest, viz. its being well known that *Lizardi* had suspended payment, induced *Paul* to refuse to pay the bills. Suppose *Lizardi* had applied to *Misa* for payment for the bills on the 14th of February, and *Misa* had refused payment, I entertain no doubt that *Lizardi* might have sued him upon the contract, *Misa's* only remedy against *Lizardi* being upon the bills which, supposing they had then been refused payment, he might have been able to make available by way of set-off against *Lizardi's* claim. I have no doubt that as between *Misa* and *Lizardi* there was a sufficient consideration for the cheque upon which the action is brought.

It was conceded by the learned counsel for the Appellants that if your Lordships are of that opinion, it disposes of the entire case.

But the Court of Exchequer Chamber decided in favour of the Plaintiffs, *Glyn & Co.*, on a totally different ground. Mr. Justice *Lush,* in delivering the judgment of that Court, said, " We think it must be assumed on the facts stated in the case that if the action had been brought by *Lizardi* the Defendant (*Misa*) would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question " (he adds) " therefore is whether, under the circumstances stated, the Plaintiffs are to be considered the holders of the cheque for value." And Lord Chief Justice *Coleridge* expressed an opinion that they were not. The learned counsel for the Appellant argued that *Glyn & Co.* were not holders of the cheque for value, because the document which was handed to them by *Lizardi* on the 13th of February, dated the 14th, upon the delivering up of which the cheque was given, was either a void instrument under the Stamp Acts, or was a mere order to *Glyn & Co.* to collect the money for *Lizardi*. The ground upon which it is alleged that the instrument was void is that under the existing *Stamp Act*, 33 & 34 Vict. c. 97, bills and drafts payable on demand are liable only to 1*d*. duty, but a higher duty is imposed on bills payable any time after date, and that this bill given on the 13th, payable on the 14th, February was, in fact, payable at a future day, and therefore ought to have been impressed with the higher stamp. I am at a loss to see how the instrument in question, whether bill or draft, can be regarded as having been post-dated. There was not the slightest object by post-dating the instrument to secure any advantage of any kind to either party, but *Lizardi* being entitled to receive from *Misa* the sum of £1999. 3*s*. on the 14th of February and not before, having been pressed by *Glyn & Co.* for the reduction of his debt, and having in consequence of the pressure on the 13th of February paid to them certain cheques, gave them, on the same day, in addition, this draft upon *Misa*, which he dated on the following day, being the earliest time at which it could be available. How can it possibly be said that this draft or order so given is not properly stamped? It may be said, to use the language of the learned counsel for the Appellant, to be constructively a transaction of the following day. Supposing *Misa* could have impeached the document on this objection to the stamp, (which is by no means clear,) he never did so, but through his agent said it would be paid. There being, therefore, no objection made to its validity, the delivering it up to *Misa* constituted a sufficient consideration from *Glyn & Co.* for the cheque which they received in exchange for it.

It was farther argued that *Glyn & Co.* did not receive the order upon *Misa* for themselves, but merely to enable them to collect the amount of it for *Lizardi*, and therefore their parting with it for the cheque was no consideration moving from them. The answer to this argument lies in the statement in the Special Case that *Lizardi* being largely indebted to *Glyn & Co.*, and they having been for many days previously to the 12th of February "urgently pressing him to reduce the amount of his indebtedness," he, on the 13th of February, gave them with other cheques to the amount of £6925. 5*s.* 8*d.*, this order on *Misa*, evidently to be applied in reduction of his debt. But supposing it was merely paid in by *Lizardi* to *Glyn & Co.* they would have had a lien upon it, and if it was available against *Misa*, the giving it up for the cheque was the parting, by *Glyn & Co.*, with a security which was valuable to them.

The case in the Exchequer Chamber turned entirely upon the question, whether the pre-existing debt from *Lizardi* to *Glyn & Co.* formed a sufficient consideration for the cheque on which the action was brought, Lord Chief Justice *Coleridge*, differing from the rest of the Judges, being of opinion that it did not. It is unnecessary to enter into this question. His Lordship decided the case upon the assumption that *Lizardi's* order was worthless, and that, therefore, the giving it up by *Glyn & Co.* could form no consideration for the cheque they received in exchange. This being removed out of the way, the pre-existing debt was the only consideration which could be a foundation for their claim.

I have already expressed my opinion that *Misa* would have had no defence to an action brought by *Lizardi* upon the draft or order upon him, and that draft or order having been given by *Lizardi* to *Glyn & Co.* towards payment of his debt to them, the giving up that document was undoubtedly a detriment to *Glyn & Co.*, which amounted in law to a sufficient consideration moving from them for the cheque which was substituted for it. As already mentioned, it was admitted by the learned counsel for the Appellant, that if your Lordships were of opinion that there were was consideration between *Lizardi* and *Misa* it disposed of the whole case. I submit to your Lordships, therefore, that the judgment of the Court of Exchequer Chamber should be affirmed.

LORD HATHERLEY:—

My Lords, I agree in the opinion which has been pronounced by my noble and learned friend who has just addressed the House.

The case, although it has required considerable time for its full discussion, is reduced to really very short heads of argument.

The first question which arises for consideration is, what was the position of *Misa* with reference to *Lizardi* on the 14th of February, the day on which *Misa* gave his cheque to *Glyn & Co.*, under the circumstances to be afterwards mentioned. Now, as regards *Lizardi*, *Misa* was in this position: he had bought of him bills upon *Cadiz* for which he had engaged to pay £1999. 3*s.* The terms of the contract were, that *Lizardi* having procured and handed to *Misa* bills payable at *Cadiz* for a certain amount, the sum of £1999. 3*s.* was to be paid in cash—*Misa* would immediately, on or before the next post-day, pay to him the sum of £1999. 3*s.*, although the bills themselves would not be payable until eleven days afterwards, namely, the 25th of February. On the 14th of February, therefore, *Lizardi* was in a position to demand payment from *Misa* of the sum I have mentioned—£1999. 3*s.* We have no evidence before us of the condition of things at that time, the 14th of February itself, with regard to *Lizardi's* solvency or insolvency. The bills having been procured as I have said, had gone out to *Cadiz*, and had reached their destination. They had not been presented for payment at that time, because they were not to be due until the 25th of February, but they were in the hands of Mr. *Misa* abroad, ready to be used according to the bargain that he had entered into with *Lizardi*.

That, my Lords, being the position of things between *Misa* and *Lizardi*, I cannot have any doubt whatever that at that time, as things then stood, there was a full consideration between *Misa* and *Lizardi*. The subsequent events which made that consideration fail cannot be taken into consideration in estimating their position at that time, and the position of *Lizardi* towards a third person. That third person would be ignorant of the duty that *Lizardi* owed to *Misa*, and the possibility of *Misa* being, in consequence of that failure of duty on his part, entitled to say that, as between him and *Lizardi*, in the subsequent events which happened, the consideration had failed, could not affect him.

This being their position, we find on the other hand, that as between Messrs. *Glyn* and *Lizardi*, Messrs. *Glyn* were so far in doubt as to *Lizardi's* solvency at this date that they had begun to press him before the 12th of February with reference to payment, and there is a statement in the Case which tells us that they suspected that some of the securities deposited with them by *Lizardi* were not genuine.

The document that *Lizardi* handed to the Plaintiffs was in this form :—[His Lordship read it, see *ante*, p. 556.] The document is partly written and partly printed. The only observation which arises upon that is, that the fact of those words being printed shews that the particular form of the transaction was not an uncommon one as between parties dealing in matters of this character. We are told in the 14th paragraph, and that gives the only explanation we have of this document, that Mr. *Currie* "deposed at the trial that it was usual for Mr. *Lizardi* to sell bills on the Exchange, and then to draw an order like that set out in the preceding paragraph on the purchaser of the bills, and that that is the course of business when bills are sold." It was also deposed by Mr. *Currie* "that such orders are sometimes accepted by writing 'accepted' across them, that is, by the person on whom they are drawn writing his name across the paper, making it payable at his bankers."

A good deal of argument has arisen as to whether this document is to be treated as a bill of exchange, or whether it is to be treated simply as an authority authorizing Messrs. *Glyn & Co.* to collect this debt due to *Lizardi* from *Misa*. Now, my Lords, if I am right in coming to the conclusion I have come to, that at this time there was a good debt constituted between *Lizardi* and *Misa*, and that *Lizardi* was then in a position to have demanded payment in respect of it, it does not, I apprehend, become very material what the exact character of this document was. Supposing it to be necessary to hold it to be an authority, I do not see, regard being had to the lien which bankers have upon all documents which are placed in their hands, by customers who are indebted to them, in the course of their banking transactions, that it would make any very important difference whether it should be held to be an authority or a bill of exchange. But I agree with my noble and learned friend who has just spoken that looking to the whole character of the transaction we should err in holding this to be a post-dated instrument, that is to say, post-dated in such a manner he himself could have demanded the money, executes this negotiable instrument, with every intent, as *Misa* knew, of paying it into his bankers, and giving the bankers that lien which the case I have referred to decided that they had upon all documents of this kind which came into their hands.

My Lords, I will now advert to the ground upon which the Lord Chief Justice of the Common Pleas rested his opinion. That opinion of course makes one pause in coming so confidently to a conclusion as one might otherwise have done; still I cannot say that I have any doubt in my own mind as to the correctness of the conclusion at which I have arrived. The case of *De la Chaumette* v. *The Bank of England* (1) does not seem to me to have any bearing upon this case. There is no evidence that any question was there raised as to any right of lien as between the two parties who were acting the one as principal and the other as agent. It appeared, from the circumstances of that case, that the party suing was suing simply as an agent of a person who was bound to shew that he had given good and valuable consideration, and although something is said in the case of it being simply a debt due and nothing more, there is nothing said about there being a right of lien which authorized him to say, whatever comes into my hands I am entitled to hold, as against you, in respect of a balance that is due to me. I think in the present case, the circumstance of that lien is quite sufficient of itself without any proof of additional acts either done or forborne to be done on the part of *Glyns.*

On the other hand, looking fairly through the evidence in the Case, and looking especially at the pressure which was being put by *Glyns* upon *Lizardi* for payment, I am not prepared to say that there was not a forbearing in respect of the delivery of the first instrument; because if that instrument had not been put into their safe custody on the 13th, they might have been in a position then to pursue their suspicions to the full result—to have analysed then, on the 13th, that list of securities as to which Mr. *Currie* had already expressed his misgivings, and to have taken proceedings upon the 13th to bring *Lizardi* to that state of avowed and open bankruptcy, that he was afterwards obliged to confess himself to be in. They did nothing on the 13th, and I think that alone

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(1) 9 B. & C. 208.

H. L. (E.)
1876
MISA
v.
CURRIE.

would be a sufficient forbearance, I do not think it necessary to say more upon that part of the transaction.

On the whole case my Lords, I hold that *Lizardi* was in a condition to demand that payment, that that payment was made to him by a negotiable instrument, on the footing of the acknowledgment of a previous instrument which had been drawn for the recognition on *Misa's* part of his debt, and that he was entitled so to deposit that instrument with his bankers as to entitle them to sue in their own names for payment of that instrument, (which they have done,) without being affected with any of the consequences which might subsequently occur, on the 25th of February, from the dishonouring of the bills and the failure of consideration.

My Lords, it appears to me that it would be a very serious thing indeed in its effect upon the numerous transactions carried on by means of cheques in the city of *London* if we were to hold that any bankers holding those enormous drafts which are drawn daily, and which we read of in the accounts of the transactions of the clearing-house, are to be exposed to an inquiry as to what equities may subsist between any one of their customers (upon all of whose documents delivered to them they have supposed themselves to have a lien) and third persons, so that they might find themselves affected with equities with regard to that customer, and consequently be unable to give that credit which this right of lien at present enables them to give, and thereby contributes so much to carrying forward the vast trade of this metropolis.

LORD O'HAGAN :—

My Lords, I am quite of the same opinion. I will state in a very few words the view which I take of this case without referring to the *Stamp Act*, and several other matters which have been more than sufficiently disposed of by my noble and learned friends.

As to the question of consideration between *Lizardi* and *Misa,* notwithstanding the very able argument of the learned counsel for the Appellant, I have been unable to entertain a doubt. The bargain was for the sale of bills on a foreign house. The sale was completed. The bills were delivered. The price became payable; and the transaction, so far, was complete. *Lizardi* gave what he he himself could have demanded the money, executes this negotiable instrument, with every intent, as *Misa* knew, of paying it into his bankers, and giving the bankers that lien which the case I have referred to decided that they had upon all documents of this kind which came into their hands.

My Lords, I will now advert to the ground upon which the Lord Chief Justice of the Common Pleas rested his opinion. That opinion of course makes one pause in coming so confidently to a conclusion as one might otherwise have done; still I cannot say that I have any doubt in my own mind as to the correctness of the conclusion at which I have arrived. The case of *De la Chaumette* v. *The Bank of England* (1) does not seem to me to have any bearing upon this case. There is no evidence that any question was there raised as to any right of lien as between the two parties who were acting the one as principal and the other as agent. It appeared, from the circumstances of that case, that the party suing was suing simply as an agent of a person who was bound to shew that he had given good and valuable consideration, and although something is said in the case of it being simply a debt due and nothing more, there is nothing said about there being a right of lien which authorized him to say, whatever comes into my hands I am entitled to hold, as against you, in respect of a balance that is due to me. I think in the present case, the circumstance of that lien is quite sufficient of itself without any proof of additional acts either done or forborne to be done on the part of *Glyns.*

On the other hand, looking fairly through the evidence in the Case, and looking especially at the pressure which was being put by *Glyns* upon *Lizardi* for payment, I am not prepared to say that there was not a forbearing in respect of the delivery of the first instrument; because if that instrument had not been put into their safe custody on the 13th, they might have been in a position then to pursue their suspicions to the full result—to have analysed then, on the 13th, that list of securities as to which Mr. *Currie* had already expressed his misgivings, and to have taken proceedings upon the 13th to bring *Lizardi* to that state of avowed and open bankruptcy, that he was afterwards obliged to confess himself to be in. They did nothing on the 13th, and I think that alone would be a sufficient forbearance, I do not think it necessary to say more upon that part of the transaction.

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(1) 9 B. & C. 208.

On the whole case my Lords, I hold that *Lizardi* was in a condition to demand that payment, that that payment was made to him by a negotiable instrument, on the footing of the acknowledgment of a previous instrument which had been drawn for the recognition on *Misa's* part of his debt, and that he was entitled so to deposit that instrument with his bankers as to entitle them to sue in their own names for payment of that instrument, (which they have done,) without being affected with any of the consequences which might subsequently occur, on the 25th of February, from the dishonouring of the bills and the failure of consideration.

My Lords, it appears to me that it would be a very serious thing indeed in its effect upon the numerous transactions carried on by means of cheques in the city of *London* if we were to hold that any bankers holding those enormous drafts which are drawn daily, and which we read of in the accounts of the transactions of the clearing-house, are to be exposed to an inquiry as to what equities may subsist between any one of their customers (upon all of whose documents delivered to them they have supposed themselves to have a lien) and third persons, so that they might find themselves affected with equities with regard to that customer, and consequently be unable to give that credit which this right of lien at present enables them to give, and thereby contributes so much to carrying forward the vast trade of this metropolis.

LORD O'HAGAN :—

My Lords, I am quite of the same opinion. I will state in a very few words the view which I take of this case without referring to the *Stamp Act*, and several other matters which have been more than sufficiently disposed of by my noble and learned friends.

As to the question of consideration between *Lizardi* and *Misa*, notwithstanding the very able argument of the learned counsel for the Appellant, I have been unable to entertain a doubt. The bargain was for the sale of bills on a foreign house. The sale was completed. The bills were delivered. The price became payable; and the transaction, so far, was complete. *Lizardi* gave what he agreed to give. *Misa* received all that he had bought, and, two days afterwards, he became liable to discharge the purchase-money, and if at the appointed time he failed to do so, his liability being perfect, an action, as the Lord Chief Baron observed, would have been instantly maintainable against him; and if there had been legal machinery for the immediate trial of it, he would have been wholly defenceless and compellable to pay. His liability did not at all arise on the acceptance of the bills, or after the money had been disbursed at *Cadiz.* Until a fortnight after the second post, when the price was payable, neither of these things was to occur. And in the meantime, it was competent to *Lizardi* to do with the realised price of the bills what he pleased, and to *Misa,* on the other hand, to deal with the bills at his discretion, and nobody can tell from any information before your Lordships, what he did with them, or where they are now. On the first point, therefore, which does not appear, I think, to have been even argued in the Exchequer Chamber, it seems to me that the Respondent's argument prevails.

As to the second point, upon the relation between the *Glyns* and the Defendant, I am equally unable to appreciate the force of the argument from failure of consideration. Briefly, *Lizardi* owed a large debt to his bankers. His difficulties became known. He was pressed for payment or security. He lodged, not for the purpose of collection by his bankers, but to gain his creditors' forbearance, amongst other things, in all worth £6000, the draft of *Lizardi* upon *Misa* for the price of the bills which had been delivered. They inquire whether *Misa* will honour it, and he answers, by his agent, that he will, and sends his cheque for the amount, getting in return what alone constituted a sufficient consideration, the draft deposited to secure the debt due to *Lizardi.* That debt being undoubted, the bankers, having forborne upon the lodgment of the securities, at least for a time, to press for what was owing to them, and having got an actual assignment of *Lizardi's* admitted claim, seem to me clearly entitled to recover upon the cheque given by *Misa,* given for ample consideration, and substituted for a bill which they had held for ample consideration. If the cheque had been handed to *Lizardi* and by him to the Plaintiffs, the case would have been the same substantially. That

H. L. (E.)
1876
Misa
v.
Currie.

cheque was intended to be, and was accepted as, an actual payment; and as, if the value of it had passed in cash, *Lizardi* could not certainly have been required to give it back, the difficulty seems not less to produce the same effect by rendering it valueless in the hands of a third party, whose debt, *pro tanto*, it was plainly taken to discharge. In that way, I think the transaction should be regarded. The bankers took it, not, I repeat, for collection but for payment of a debt. But even if *Lizardi* had sent the security to the Plaintiffs as his bankers, and not as his creditors, it would have been in their power to hold it as affected by their lien with exactly the same result. So that in my judgment, with very sincere respect for the opinion of the Lord Chief Justice of the Common Pleas, *quâcunque viâ datâ*, whether they took as bankers or as creditors, they are equally entitled to maintain this action, and the decision of the Court of Exchequer and of the Exchequer Chamber ought to be sustained.

Judgment of Court of Exchequer Chamber affirmed; and appeal dismissed with costs.

Lords' Journals, 26th June, 1876.

Solicitors for the Appellant: *Dawes, Sons, & Rolph.*
Solicitors for the Respondent: *Murray, Hutchins, & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1876
June 20.

4 Ch D. 612.
2 App Cas 317
6 Ch D. 425.

HARRISON *et al.* . . . . APPELLANTS;

THE ANDERSTON FOUNDRY COMPANY . RESPONDENTS.

Letters Patent for a new Combination of old Machinery.

If the combination and application of old machinery be new and beneficial, the invention of this combination may be protected by patent.

Proof required.

Per THE LORD CHANCELLOR (1):—If there is a patent for a combination, the combination itself is the novelty, and also the merit, which must both be proved by evidence.

Per LORD PENZANCE:—In the present case all questions of fact were withdrawn from the jury.

The Specification.

Per THE LORD CHANCELLOR:—The specification appears to me *ex facie* to distinguish the new from the old where it is necessary to distinguish the new from the old; and to claim for a combination in a manner which is sufficient.

New Trial.

Interlocutor appealed from reversed, and the case sent back for a new trial.

THE Appellants, engineers at *Blackburn*, in *Lancashire*, applied to the Court of Session for an interdict to restrain the Respondents from infringing certain letters patent granted in 1868 for improvements in "loom weaving," to which the Appellants claim right under an assignment from the inventors, dated 30th September, 1871. The allegation was that the Respondents, in the manufacture of power-looms, "had been making, using, and vending the Appellants' invention."

The Court of Session (First Division) on the 18th of January, 1876, refused the interdict; holding that the letters patent were void; the specification, according to the opinion of the Scotch Judges, failing to shew "wherein the invention consisted, or what was the novelty the patentees claimed."

The case in its prior stages is very fully and elaborately reported in the Fourth Series of the Scottish Law Reports (1), describing the machinery and its working.

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(1) Lord *Cairns*.

H. L. (Sc.)
1876

HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

Upon appeal to the House against this decision, Mr. *Aston*, Q.C., and Mr. *Asher* (of the Scotch Bar), were heard for the Appellants; and *The Attorney-General*, Mr. *Balfour* (of the Scotch Bar), and Mr. *R. E. Webster*, for the Respondents.

It was remarked that the case could not be satisfactorily set forth by oral or verbal explanation; and therefore specimens and drawings of the machinery were handed in for their Lordships' examination.

The following opinions were delivered by the Law Peers:—

THE LORD CHANCELLOR (2):—

The present appeal is brought from an interlocutor of the 18th of January, 1876, by which the First Division of the Court of Session disallowed an exception to a direction to the jury given by the Lord President at a trial of a patent action brought by the Appellant.

The direction of the Lord President was to the effect that the letters patent of the 29th of October, 1868, upon which the Appellant sued, were void in law, and that the jury must therefore return a verdict for the Defenders.

This direction was given in consequence of opinions which had been expressed by the Court of Session at the hearing of certain exceptions taken on the occasion of a previous trial of the action. The result of those exceptions was that a new trial was directed, upon which new trial the direction now in question was given. On the argument of the former exceptions the learned Judges of the First Division held that the letters patent were *ex facie* void, and sent the case down to a second trial in order that this opinion might be acted upon.

A considerable body of evidence had been entered into at the previous trial, and this evidence was taken as repeated *pro formâ* at the second trial. Nothing, however, now turns upon the evidence. The question has been treated by the Court, and was treated in argument at your Lordships' Bar, as one merely of

(1) Vol. ii. p. 857.

(2) Lord *Cairns*.

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

construction of the specification. If your Lordships should be of opinion that the specification is not *ex facie* void, the case will have to go down again to another trial, and upon such further trial every other question will be entirely open. The invention may turn out not to be new, or not to be useful; or the specification, when tested by evidence, may appear to be not intelligible or not sufficient for the instruction of a skilled workman. All these points will be open, and other questions may possibly arise. The question, and the only question, now to be determined is, whether, reading the specification as it appears before us, your Lordships ought to say that it is upon the face of it, by reason of something contained in it, or something omitted, invalid.

Your Lordships will find this question to be further narrowed into the construction of the first claim. The Lord President, in respect to the first claim, says that it clearly fails, because it contains no discovery or explanation of the novelty, but is simply a claim for the whole machine as shewn in the drawings and described in the specification. Lord *Gifford*, before whom the case had been tried in the first instance, says that it appears to him that the validity of the patent in point of law turns entirely on the first claim in the specification. Had that first claim not been stated, he thinks there would have been no valid legal objection to the other claims. It is the first claim which endangers the whole specification. And the objection (he continues) arises in this way: the absolute and indispensable condition of the patent and monopoly claimed by the patentees is that they must disclose the nature of their invention and the manner in which it is to be performed. While they have done the latter with great minuteness, they have failed in their first claim, or anywhere else, to state what their invention is.

It is necessary, therefore, to turn to the specification, and to consider what, on the face of it, the patentees appear to claim. The specification commences thus: "Our invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of 'compound' or 'multiple' shuttle-boxes of looms for weaving striped, checked, and other ornamental or figured fabrics, requiring two, three, or more shuttle-boxes in each set."

H. L. (Sc.)
1876
HARRISON v. ANDERSTON FOUNDRY COMPANY.

The specification then describes in detail, and by reference to drawings, the arrangements of mechanism in question, numbering the parts from 1 to 35, and from 36 to 62, and then continues: "What we believe to be novel and original, and therefore claim as the invention secured to us by the letters patent is,—First, the construction and arrangements of the parts of pattern mechanism, and a shuttle-box moving and holding mechanism as herein distinguished generally, for actuating the shuttle-boxes of power looms, all substantially in the new or improved manner herein described and shewn in the drawings or any mere modification thereof."

Following, and apparently distinguished from this first claim, which is a claim for the construction and arrangements of the parts of mechanism as therein distinguished, generally, by which I understand the patentees to claim generally, or as a whole, the combined mechanical arrangement described in the specification, there are added, second, third and fourth claims, each relating to particular portions or movements in the general mechanism described in the first claim.

It is not, as I have already pointed out, disputed by the Court of Session that the second, third, and fourth claims, if new and useful, are sufficiently expressed in point of form. In my opinion, the first claim is also sufficient in point of form. It is, as I read it, a claim for a combination; that is to say, a combination of all the movements going to make up the whole of the mechanism described. It must, for the present at least, be assumed that this combination, as a combination, is novel; that it is, to use the words of the Lord President (1), a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way. It is not doubted that a combination of which this may be said is the subject of a patent. What, then, are the objections to the first claim viewed as a claim for a combination?

The first is an objection said to be founded upon the case of *Foxwell* v. *Bostock* (2), decided by the late Lord *Westbury* when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a

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(1) 4th Series vol. ii. p. 865.

(2) 4 De G. J. & S. 13; 12 W. R. 725.

2 App Cas
317.

discovery or explanation of the novelty, and the specification must shew what is the novelty, and what the merit of the invention. I cannot think that, as applied to a patent for a combination, this is, or was meant to be, the effect of the decision in *Foxwell* v. *Bostock* (1). If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new. If, indeed, it were left open on the specification to the patentee to claim, not merely the combination of all the parts as a whole, but also certain subordinate or subsidiary parts of the combination, on the ground that such subordinate and subsidiary parts are new and material, as it was held a patentee might do in *Lister* v. *Leather* (2), then it might be necessary to see that the patentee had carefully distinguished those subordinate or subsidiary parts, and had not left it *in dubio* what claim to parts, in addition to the claim for combination, he meant to assert. The second objection to the first claim in the present case was founded on the doctrine of *Lister* v. *Leather* (2). In the present case, however, no question of this kind appears to me to arise. The patentees claim, as I have said, for a combination under their first claim, calling it "the construction and arrangements of the parts of mechanism herein distinguished, generally," and in their second, third, and fourth claims they have specified the subordinate or subsidiary parts to which they lay claim as novel, and the specification of these subordinate or subsidiary parts appears to me to exclude the possibility of a claim for any other parts as novel.

The specification, therefore, appears to me *ex facie* to distinguish the new from the old, where it is necessary to distinguish the new from the old; and to claim for a combination, where it is claimed, in a manner which is sufficient for a combination of the kind described. My Lords, I am, therefore, of opinion, differing with great respect from the opinions of the Judges of the Court of Session, that this action cannot be stopped at the point at which it has been stopped by the Court in *Scotland*, and that the interlocutor ought to be reversed, and the exception allowed, and the case go down to a new trial, where, as I have already said, every other question will be open, and where the evidence will have to be examined and applied with reference to all the issues in the case. I move your Lordships that the interlocutor be reversed, and the case remitted, with a declaration that the exception ought to have been allowed and a new trial had.

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(1) 4 De G. J. & S. 13; 12 W. R. 725.

(2) 8 El. & Bl. 1004.

25947

LORD CHELMSFORD:—

My Lords, although the argument upon this appeal took a wider range, the only question which is open upon it is the sufficiency of the specification upon the face of it; and all that is necessary for the determination of that question is to ascertain whether there is such a description given of the invention by the specification and the drawings annexed to it as will enable a workman of ordinary skill and information, by following them, to produce the thing patented. As no doubt has been raised as to the sufficiency of the description, to this extent it must be assumed.

But the specification may fail in some other essential respect, and so it is said to have done by the First Division of the Court of Session. That Court held that the specification was bad, not because it was ambiguous, or uncertain, or unintelligible, but, according to what was said by the Lord President, because there was no discovery or explanation of the novelty of the invention. "No doubt" (his Lordship said) "a new combination of old parts to produce a new result, or produce a known result in a more useful and beneficial way, may be a good subject-matter of a patent, but only under the conditions that the combination shall be claimed as a combination, and be so described as to shew intelligibly what is the novelty, and what the merits of the invention." Lord *Gifford*, following the same course of reasoning, said: "The patentees have failed to tell the public what they truly claim as their invention. They should have said what they claimed and what they disclaimed. They should tell us what is new, and if they claim too much the patent goes."

With great submission the claim of a combination or arrangement of parts of a machine without more, is in itself a sufficient description of a novel invention, *i. e.* of a combination of parts which have never been combined in the same manner before. The explanation of the novelty is to be found in the description of the arrangement of the parts in the body of the specification. Whether the combination claimed is new or not is a question of fact to be proved on a trial. Where a claim is clearly and distinctly made, there can be no necessity for a patentee to distinguish between what is claimed and what is disclaimed. It is enough to say in answer to Lord *Gifford's* suggestion that everything which is not claimed is disclaimed. It may be necessary for a patentee sometimes not to disclaim in his specification, but to state what he does not claim. Where, for instance it may not be possible to explain his improvements of a machine without describing other closely connected parts of it which are not patented, it may then be proper and certainly prudent for him to state that he does not claim these as parts of his invention and to add a distinct description and limitation of his claim.

The opinions of the Judges of the Court of Session were in the argument maintained on the authority of Lord *Westbury* in *Foxwell* v. *Bostock* (1) and certainly the observations of that noble and learned lord closely resemble those which I have mentioned of the Lord President and of Lord *Gifford*. In the case cited, Lord *Westbury* said, " The term ' combination of machinery ' which has of late been a favourite form of words with patentees, is nothing but an extended expression of the word ' machine.' It is the word ' machine ' writ large, and as a patent for an improved machine in the specification of which the improvement is not particularly stated and described, would hardly be attempted to be supported, so neither in my judgment can the patent for an improved arrangement or combination be supported in the specification of which there is nothing to distinguish the new from the old."

It cannot be doubted that in a patent for an improved arrangement or combination of machinery " the specification must " (as Lord *Westbury* said in *Foxwell* v. *Bostock*) " describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine." But it is clear that if the claim is for a combination of particular parts of the machine and for that only, the *differentia* (to use Lord *Westbury's* expression) is sufficiently assigned. And as it is admitted that there may be a good patent for a new combination of parts, all of which or a portion of which are severally old, upon what principle can a patentee claiming a combination be required to distinguish the new and the old parts from each other?

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(1) 4 De G. J. & S. 13.

The argument at the Bar extended far beyond the limits of the question, which, as already observed, is confined to the sufficiency of the specification, and a good deal of time was occupied in discussing what was covered by a claim for a combination, and by reference to the decision in *Lister* v. *Leather* (1), that a valid patent for an entire combination gives protection to each part that is new and material without any express claim of the particular part. It is unnecessary for the determination of this appeal to consider the propriety of this decision; but I cannot forbear expressing a doubt whether it can be supported. If a patent is solely for a combination nothing is protected by it, and consequently nothing can be an infringement but the use of the entire combination.

I do not think it right to dwell on this irrelevant matter further, but I return to the question whether the patentee has sufficiently described his invention in his specification. This question turns entirely (as has been said) on the first claim in the specification. The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented. In the construction of a specification, it appears to me that it ought not to be subjected to what has been called a benign interpretation or to a strict one. The language should be construed according to its ordinary meaning—the understanding of technical words being of course confined to those who are conversant with the subject-matter of the invention—and if the specification is thus sufficiently intelligible it performs all that is required of it.

It is not asserted that the description in the specification is not sufficiently explicit and clear to enable a workman of ordinary skill and information to make the thing patented. In what, then, is the claim in the specification supposed to fail? As far as can

(1) 8 El. & Bl. 1004. 4 Jun 11 8947

be gathered from the opinions of the Judges, it is from the want of an explanation of the novelty of the invention. But if the claim is for a combination, it has been fully shewn that the claim itself is a statement and assertion of novelty.

What is it, then, that the patentee claims in the head of claim to which the objection is confined? It appears to me that, although this important part of the specification is not very artistically drawn, it is sufficiently intelligible to be read as a claim for a combination of two separate parts (called improperly the two main parts) of an entire machine, consisting of the mechanical apparatus called respectively the shuttle-box moving mechanism and the pattern mechanism, both of which are described in the specification and delineated upon the drawings with great minuteness of detail, and, as must be assumed, with sufficient clearness to enable a workman of ordinary skill to follow the directions.

In the other heads of claim, parts of the mechanical apparatus are claimed separately. There can be no objection to a claim of a combination, and at the same time to a claim of the separate parts of that combination; and, indeed, it is the only way in which those separate parts can be protected from infringement. And it is immaterial whether the separate parts are claimed first, and then the combination, or, as in this case, the combination first, and then the separate parts.

The patentee seems to me to have framed his specification in such a manner as to make it unobjectionable on the face of it, and therefore I think the interlocutor appealed from ought to be reversed.

LORD HATHERLEY:—

My Lords, I am of the same opinion.

I think it is a very unfortunate circumstance in this case that, the jury on the original trial having been charged with the duty of finding under the several heads usually applicable to patent cases, namely, the heads of novelty and of usefulness combined with the head of infringement, as regards the right of the Pursuers to pursue the Defenders, the course taken was such as to have led to a singular result upon the application that was made for a new trial. The jury, not unanimously, but by a majority, had decided all the issues originally in favour of the Pursuer. A bill of exceptions was thereupon tendered; and without entering into more detail on the subject, I may say that the course the matter took was this: when it came up to the First Division, the Court was of opinion that the matter had not been properly laid before the jury, and that there was a primary question with regard to the patent itself, which ought to be considered before they came to their conclusion upon either the infringement or the novelty of the invention. That question was as to whether or not, whatever the thing was, whether new or otherwise, it had been sufficiently clearly described and claimed in the specification.

Accordingly, the case went back, more *pro formâ,* I may say, than anything else, upon this question to another trial, and the learned Judge who then presided directed the jury, as a matter of of law, with such amount of evidence only as was necessary to raise that issue, that the specification itself was bad; because, regard being had to the first claim (the other claims were not further entered into), there was not a sufficiently clear statement on the part of the patentee of what his invention really consisted, and what it was that the general public were excluded from in consequence of the novelty of the invention, and what it was that they were at liberty to do; it being admitted that a great many of the particular portions of the machinery in question, indeed, I think the counsel for the patentee, in arguing the case at the Bar, said he was ready to admit that the whole of the particular movements in question, were in themselves and existing separately, as distinct from a combination of them, matters which had been previously known.

2 App Cas
317

Well, my Lords, that being the case, the Judges extended, as it appears to me, with great respect, the doctrine of *Foxwell* v. *Bostock* (1) in their application of it to this case. It was there held—and that, I think, was all that was held—that it is not competent to a man to take a well-known existing machine, and having made some small improvement, to place that before the public, and say: "I have made a better machine. There is the sewing machine invented by so and so; I have improved upon that. That is mine; it is a much better machine than his." That will

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(1) 4 De G. J. & S. 13.

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

not do; you must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was adopted, I think, by Lord Justice *James* in another case, it will not do, if you have invented the gridiron pendulum, to say, "I have invented a better clock than anybody else," not telling the public what you have done to make it better than any other clock which is known.

That principle was laid down in *Foxwell* v. *Bostock* (1), and I do not think that anything further was intended to be determined in that case. It could not have been meant in that case to say that where that happens, which may well happen, that a person, arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement, produces an improved effect by his new arrangement, that new arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well known; but if he says: "I take all these well-known parts, and I adjust them in a manner totally different from that in which they have ever before been adjusted; I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect, and it is this, that they have not been properly arranged; I have therefore reconsidered the whole matter, and put all these several parts together in a mode in which they never were before arranged, and have produced an improved effect by so doing,"—I apprehend it is competent to that man so to do. and that it would be perfectly impossible for him to say what is new and what is old, because *ex concessis* it is all old, nobody ever before used it in the manner in which he has used it.

That, my Lords, I apprehend is the principle of a patent for a combination. It seems to me that that is just what this gentleman claims to have done. Whether or not he has really done it will remain to be seen. It is true enough that a majority of the jury in one case found in his favour; but this question will have to be tried, and will have to be decided after the case has been remitted as has been proposed by the noble and learned Lord on the woolsack.

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(1) 4 De G. J. & S. 13.

Now what is it that the patentee takes upon himself to say? He simply tells you in the first part of his letters patent: "Our said invention consists in new or improved simple and most efficient modes of and arrangements of mechanism for actuating the set or sets of compound or 'multiple' shuttle-boxes of looms for weaving striped, checked, and other ornamental or figured fabrics."

Then he proceeds to describe that combination which he says effects this new and improved mode; and he divides for that purpose the composition of a loom into two main parts, which he calls the check shuttle-box moving mechanism, and the pattern mechanism. That is well known to those engaged in this particular pursuit, and there is no question that any workman at all skilled in the manufacture would be able directly, from this description, to do that which the patentee says he desires to have done for the purpose of effecting his improvement. There are but two parts; namely, first, the one part which brings the shuttle-box up to the point where the delivery is to take place of the thread, exactly in such a position as to be suitable for the work in hand; and, secondly, the mode of connecting that with the pattern mechanism which guides and directs the threads so that they may take their proper course in weaving and effectuating the pattern which is to be produced. The patentees tell you they have directed their attention to what they call these two "main parts." Having done that they divide the parts carefully; not, however, always with extreme precision, inasmuch as sometimes they throw into what they call the check shuttle-box moving apparatus two or three numbers which they afterwards seem to include in the pattern apparatus as being a portion of that. But I apprehend there is no confusion introduced by so doing, because the numbers are all given; every portion of the machinery is well described, well figured, and well numbered, and no mistake can be made as to what portions of the machine they intend to describe and to use.

Having done that, I take occasion to notice, with reference to the claim at the end of the patent, that the patentees inform the public that:

> Although the new check shuttle-box moving mechanism (numbers 1 to 29)

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

has, so far, been only shewn and described as applied to a three shuttle-box loom, it is equally applicable for working a four, five, or six shuttle-box, and it can be worked with the pattern mechanism of check looms now in use where these are in a good state and of a suitable construction and only the shuttle-box moving mechanism required, and many of its improvements in the pattern mechanism numbers 30 to 62 may be applied to other pattern barrels and mechanism heretofore or now in use for check shuttle-boxes.

It is rather important to notice that with reference to the claim at the end of the patent, because what they say is this: first, we have made a new combination which runs through the whole arrangement of pattern loom weaving; we have made a whole set of apparatus which we call the check shuttle-box moving apparatus; and the junction of that check shuttle-box moving apparatus which we have so framed in a new combination, we apply also, by a process which is a new combination, to a certain pattern part of the apparatus which we have here in our patent described and figured. But they say: It is not necessary that you should take our combination for pattern machinery; you may if you like take your own combination of pattern machinery and apply it to our new check shuttle-box moving machinery, or *vice versâ;* you need not take our check shuttle-box moving machinery, but you may take our pattern machinery and apply your own check shuttle-box moving machinery to that.

Therefore you would expect *à priori* that when you come to the description of the claim you would find that they would claim for the general combination of the whole, and they would also wish to secure (as they are entitled to secure, if it be novel and useful), the one-half of their machinery, namely, the machinery for moving the check shuttle-boxes according to the improved combination; they would also wish to secure the other half, their pattern machinery, according to their new combination for that. So they say—There are three things you must not do. You must not put your whole machinery into a combination which will follow ours with reference to the complete machine. You must not put your check shuttle-box moving machinery into a combination which will be our combination for that purpose. You must not put your pattern machinery into a combination which will be our combination for that particular purpose.

That, my Lords, is what it appears to me the patentees have done by the claims which are contained at the end of the patent:

> Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described or delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited letters patent, is—First, the construction and arrangement of the parts of pattern mechanism and shuttle-box moving and holding mechanism as herein distinguished generally.

That seems to me to be the one great claim for the whole. They say—We cannot tell you that this part or that part or the other part is in itself a new engine or a new machine, but we tell you that our combination of all those parts into a complete machine, affecting both the shuttle-box moving apparatus and the pattern apparatus, is a new combination, and we claim to be capable of carrying that out in an improved manner under the specification in our letters patent.

Well, my Lords, that may or may not be true—that will have to be decided. It may or may not be true that it is novel and that no one ever combined it in that way before—it may or may not be true that when the combination is so effected it is of any use. It may be that the old combination is as good as the new, and that no useful purpose is effected. That again will have to be for the consideration of the jury. But what the learned Judge who directed the issue to the jury at the trial, and what the learned Judges who concurred upon the subsequent review of the case, have done is this: The jury were told that, according to *Foxwell* v. *Bostock* (1), there is no claim for anything in the first claim which is here made—nothing specifically pointing out anything new which the patentees describe as being a novelty; whereas, my Lords, it appears to me, I confess, that as far as their words go in their claim (it is for them to make out their case), they have claimed sufficiently distinctly a total and complete combination; from 1 to 64 they have put together every single number in a certain order and manner. Of course it may be said that this does not preclude a question as to the substitution of a mechanical equivalent which may be substituted in one place or another, with the particular object the patentees had in view. For example, as one of the learned Judges put it, if the machine were turned upside down instead of putting it the right side upwards, would a person on that ground be allowed to say he had not been infringing the patent? In all other respects this combination, if invaded, will only be invaded by that which breaks in on the whole combination which the patentees have here described in their first claim, and which they say they prohibit the public from using on account of these their letters patent.

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(1) 4 De G. J. & S. 13.

Then you come to the second, third, and fourth claims. The second claim turns on what I said you would expect to find—a claim as regards a combination which shall imitate the patentees' check shuttle-box moving machinery. The third relates to a combination which shall imitate their pattern machinery, and the fourth is also directed to a combination that shall imitate in another respect their pattern machinery.

Now, my Lords, the patentees having therefore said we have here one total combination which is new; having said we have here three special parts which are wholly new in combination, I apprehend they have both told you what they claim, and they have done another thing which appears to the noble and learned Lord on the woolsack to be necessary (and in that I entirely concur), they have by the special claim made under the other three heads warned off the public from those heads, and have left open and have made no claim, and are not to be treated as having in any way made a claim unduly or improperly to anything more than the first total combination running through the whole, the subordinate combination running through all the description up to 32 for the check shuttle-box moving machinery, and the two other subordinate combinations going up to the higher numbers 64 or 65, which compose the part of the combination for effecting and making the pattern machinery.

Under these circumstances, my Lords, with that diffidence which one ought to feel in differing from so many of the learned Judges in the Court below, I am of opinion that this interlocutor of the Court of Session cannot be sustained and must be reversed with the direction proposed by the noble and learned Lord on the woolsack.

LORD PENZANCE :—

My Lords, I agree in the course which your Lordships have been advised to take, and will shortly state my reasons.

In this case all questions of fact have been withdrawn from the jury, the specification has been held to be bad, and the patent consequently void in law; and the question is, whether the direction of the learned Judge to that effect was erroneous or not.

The objection taken to the specification, as I gather it from the opinions of the Judges in the Court of Session, is as follows:

> There is no statement that any part or parts of the mechanism are new, or that any part or parts are old or disclaimed. The claim is simply for the construction of the pattern mechanism, and the arrangement of its parts in the new and improved manner described and shewn in the drawings, and for the construction of the shuttle-box moving and holding mechanism, and the arrangement of its parts in the new and improved manner described in the specification and shewn in the drawings. Each of these mechanisms it is said is described in the specification and shewn in the drawings as a whole, and thus the claim is in effect for the two entire machines, without even an attempt to state in what the novelty of either the one or the other consists.

And again:

> The combination must be claimed as a combination, and be so described as to shew intelligibly what is the novelty and what the merit of the invention. There is no discovery or explanation of the novelty; on the contrary, the claim is simply in each case for the whole machine as shewn in the drawings and specification. The patent is therefore void as claiming too much.

These observations made by the Lord President are directed to the first claim in the specification (to which alone exception has been taken), and the substance of them, as I understand them, is this, that the patentee has claimed as the subject of his patent the whole of an entire combination of mechanism, which he has fully described, but has not gone on to state whether any, and, if so, which of the parts of this combination are new or old; further, that he has not explained the merit of his invention, and that therefore his patent is void as claiming too much.

It will not be denied that a valid patent may be granted for a new combination of parts, all of which are old. If so, the question arises, how should the claim for such a combination be described? The patentees in this case have said:

> What we believe to be novel and original, and therefore claim as our invention,

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

is the combination and arrangement of parts, &c., ... in the new manner described and shewn in the drawings.

Is not this a statement of what the novelty consists in? The claim is confined to the combination, and the nature of the combination is fully described both by words and drawings. They lay no claim to novelty in any particular part or subordinate combination of parts, but they say that the "novelty" consists in the entire arrangement of the whole made "in the new manner" described. What they say in effect is, that such an entire combination has never been contrived before, and that it is a useful one.

Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? in other words, to point out everything that in the several parts or the subordinate combinations of them might be old and had been previously used? I cannot think that they were, or that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom, it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention, and the limits within which that which he claims as a novelty is confined, he is not bound, as it seems to me, to go further and specify how it is, and why it is, that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements.

The cases that have been cited at the Bar are all cases of a very different description. They are cases in which *the facts have been ascertained;* and it has turned out that while the specification claimed an entire combination, the real invention resided in something short of that entire combination, and consequently the patent has been held void as claiming too much. In all of them this proposition is insisted upon, that a patentee who has invented a particular combination of parts, which combination forms a portion only of a larger combination, or of an entire machine, is bound in his specification to limit his claim or description of the thing invented to the particular combination in which the inven-

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

tion resides, and that if in place of so doing he describes or claims the larger combination, or the whole machine, his patent is void.

This doctrine in respect of patents is to be found shortly and clearly stated nearly one hundred years ago in the passage quoted in the Respondent's case at p. 9: "The patent must not be more extensive than the invention; therefore if the invention consist in an addition or improvement only, and the patent is for the whole machine or manufacture, it is void"; per Lord *Mansfield* in different cases; and per Justice *Buller* in *Rex* v. *Else*, A.D. 1785 (1). From that time to the present this doctrine has been sustained; but in all the cases in which it has been applied to defeat a patent, the real nature of the invention has been ascertained by the proper judges of the facts, whether Court or jury, as the case may be; and the description in the patent, when compared with the real invention, has been found to be larger than the invention which it professed to describe.

But it is obviously impossible to apply a doctrine of this kind to a case in which the Court has nothing before it but the specification itself, and this is the state of things in the present case; for although the evidence in the case was put in *pro formâ*, and was therefore before the Court, the conclusions of fact, as to the nature of the Pursuer's invention, remained to be drawn by the jury, and in the course which the case took under the direction of the learned Judge were never drawn at all.

The important distinction, therefore, between the cases cited and the present is, that in the present case, in the stage at which it had arrived, no valid objection to the specification could be entertained which was not apparent on the face of the specification itself; whereas, in the cases alluded to the specification was condemned only upon a comparison with the real invention. Thus, in *Clarke* v. *Adie* (2) the whole facts were before the learned Judge, who had to decide on fact as well as law. In *Parkes* v. *Stephens* (3) the Judge was again judge of both law and fact—the facts were fully before the Court, and the real invention compared with the specification. The learned Judge said that "the sufficiency of the specification was a question of fact," and ended by deciding that the Defendant had not in fact infringed the Plaintiff's patent.

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(1) Buller's Nisi Prius, p. 76.
(2) 21 W. R. 456–764.
(3) L. R. 8 Eq. 350. 8/

(2/8 Ca. appeal Lo. 10 Ch. 667)

Finally, in *Foxwell* v. *Bostock* (1), the case so much relied upon, the true invention was declared by the Lord Chancellor, who was judge of both law and fact, to consist in a single shaft with certain cams upon it; whereas the Plaintiff, in his specification, had described as his invention an entire sewing machine. It was to this state of things, this variance between the actual invention and the description of it, the invention residing only in a part, and the description of the invention embracing the whole, of a sewing machine, that Lord *Westbury's* remarks were addressed when he said: "I must, therefore, lay down the rule that in a patent for an improved arrangement or new combination of machinery the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine, it must, to use a logical phrase, 'assign the *differentia*' of the new combination." The entire machine in that case was a sewing machine; the new combination was "an arrangement of three cams on one shaft;" and Lord *Westbury* held that, although "it was true that the cams and the shaft were described indiscriminately with the rest of the machine in the specification, there was nothing to indicate that it was this addition which constituted the improved arrangement or new combination." By "assigning the *differentia*" there I understand Lord *Westbury* to have meant that where the patentee's invention only extended to a portion of an entire machine, he must point out the limits of that portion, distinguishing it from the rest of the machine of which it forms a part.

But what has the duty thus cast upon the patentee in cases of that description to do with the present case, in which the patentees, on the face of their specification, claim that "what is novel and original" is not any portion of an entire combination, but the entire combination itself? On the face of the specification *non*

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(1) 4 De G. J. & S. 13.

H. L. (Sc.)
1876
HARRISON
v.
ANDERSTON
FOUNDRY
COMPANY.

constat that their invention does consist in anything short of that entire combination, or that it would be adequately described by any words which did not include the whole of it.

Some confusion appears to me to have been imported into the argument of the case by opening the question of what will amount to an infringement of a patent, which, like the present, claims as novel an entire combination of several parts, many of which may be old. This question, I think, is quite separate and distinct from the sufficiency of the specification on the face of it, which is all that we have to do with here.

But the case of *Lister* v. *Leather* (1) has been cited and commented upon as an authority for the proposition that a patent for a combination covers and protects all subordinate combinations, or parts, or at least such of them as are "new and material." It is plain, however, that that case did not go this length. It decided nothing more than this: that though the patent is for a combination, it does not follow that there can be no infringement of it unless every part of that combination, without exception, is pirated. What the Court said was, that the taking of a subordinate part or parts of the combination *might* be, not that it necessarily would be, an infringement of the patent; and that, whether it would be so or not depended, as the Court of Error said, "upon what the parts taken were, how they contributed to the object of the invention, and what relation they bore to each other."

This only amounts to saying that on a question of infringement the essential nature of the invention will be regarded; and that there may be cases in which, though the patent is for an entire combination of numerous parts, a collusive imitation of that invention may be effected though some detail of the combination is omitted or changed, which is a doctrine familiar enough in patent law.

Upon the whole, then, I am of opinion that the direction of the learned Judge cannot be sustained. The case must, I think, go to a jury; and if on the evidence there is room for the jury to find that the novelty and usefulness of the Pursuer's arrangements—in other words, the Pursuer's invention—consists in anything short of the entire combination mentioned in their first claim, the jury should be directed that, in the event of their arriving at that conclusion, they should find for the Defenders on the Pursuer's issue of infringement, on the ground that the patent is void in law.

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(1) 8 El. & Bl. 1004. 4 Jur NS 967.

Interlocutor of the 18*th of January*, 1876, *reversed; and case remitted with a declaration that the exception ought to have been allowed, and a new trial had.*

Agents for the Appellants: *Grahames & Wardlaw.*
Agent for the Respondents: *George Faithfull.*

[PRIVY COUNCIL.]

ALFRED HOLLYMAN AND OTHERS . . . DEFENDANTS;

AND

MARTIN NOONAN AND OTHERS . . . . PLAINTIFFS.

J. C.*
1876
Jan. 18, 29;
Feb. 1;
April 7.

Queensland Gold Fields Act, 20 *Vict.* c. 29—*Rules of* 1866—*Ordinary Quartz Claim—Ownership of Claim and Incidents thereof—Discoveries of Gold in "new Locality."*

On the 14th of April, 1868, the Appellants took up and registered an ordinary quartz claim, known as *M.*, under the *Queensland Gold Fields Act*, 20 Vict. c. 29, and the rules issued thereunder in 1866, and marked out the boundaries thereof upon what they supposed to be the line of the *M.* reef.

The Respondents were transferees of another claim or reef known as *G.*, allotted and registered on the 1st of July, 1868; but the southern boundary of their claim was eventually placed by the gold commissioner within the lateral limits of the Appellants' claim.

In an action by the Respondents in the Supreme Court of *Queensland* to recover damages for a trespass alleged to have been committed by the Appellants in the Respondents' claim, and in their mine under the surface thereof, and for taking and removing therefrom certain gold and gold-bearing quartz, and converting the same to their own use, it appeared that the quartz taken by the Appellants, though within the boundaries marked out by them as their claim, had been taken from the *G.* reef within the boundaries of the Respondents' claim as finally marked:—

Held, that the Respondents, as ordinary quartz reef claim holders, were entitled to the gold and quartz, the subject of the action, and to recover damages against the Appellants for removing and converting it to their own use.

Secondly, that under the Regulations of 1866 an ordinary quartz claim did not vest in the holder the right to all gold or quartz beneath the surface area of the claim; and that under Rule 58 such claim was not a block claim, but was confined to the line of the quartz reef in respect of which the claim was taken up.

Thirdly, that the Respondents' claim entitled them to all the gold in the *G.* reef within the lateral limits to which they were entitled, provided that they did not trespass upon the claim of any other miner.

Fourthly, the Appellants' claim being limited to the line of the *M.* reef, the Respondents were not trespassing on the Appellants' claim by taking gold and quartz from the *G.* reef.

An ordinary quartz reef claim is a claim on the line of a quartz reef, and is confined to the particular reef to which the claim refers, and the holder of it is not entitled to take gold or quartz from any other reef within the area or limits of the claim.

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* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Under the rules the discoverers of gold in any new locality, not exceeding two miles from any known working reef, are entitled to a reward claim of 120 feet in length; and if already holders of miner's rights, to an ordinary quartz claim in addition to a reward claim.

The claims of both parties and their rights and interests thereunder, which were created before the Rules of 1868 or 1870, must be determined with reference to the Rules of 1866.

APPEAL from a judgment of the Supreme Court of *Queensland* (March 31, 1874), discharging a rule *nisi* for a new trial obtained by the Appellants above named.

The Respondents were the owners of a certain gold mining "claim" (defined by sect. 2 of the *Gold Fields Management Act*) called "*Glanmire Prospectors' Claim*," situate at the *Gympie* gold field, in the colony of *Queensland*, and of certain mining rights belonging to such claim. The Appellants were owners of an adjacent mining claim called No. 5 *South New Monkland*, and of the mining rights thereto belonging, and the action was brought by the Respondents for a trespass committed by the Appellants upon the *Glanmire Reef* within the *Glanmire Prospectors'* claim.

The material sections of the above-named Act, which was passed by the Legislature of *New South Wales*, and of the rules issued thereunder, are set out in the judgment of their Lordships, as also are the circumstances under which the Appellants and Respondents respectively acquired and registered their title to their several claims. The Appellants in the above-mentioned action pleaded not guilty and not possessed. The Chief Justice (Sir *James Cockle*) held and directed the jury that, according to the proper interpretation and construction of the Regulations, the Respondents were entitled to 360 feet along the course of the *Glanmire Reef*, and that if they could not obtain that length of reef within the limits of their own claim, they were entitled to follow it into the Appellants' claim. The jury found a verdict for the Respondents with £1000 damages. A rule *nisi* for a new trial and to reduce the damages was subsequently obtained, and, after argument, discharged.

The reasons given by the Supreme Court for discharging the rule were as follows:—

J. C.
1876
HOLLYMAN
v.
NOONAN.

"1. The title to the reef, for a trespass to which this action is brought, depends upon the Act 20 Vict. No. XXIX., and Regulations made thereunder.

"2. Subject to such Regulations, 'miner's rights' were issued to all the parties. This 'right' remains in force for twelve months, and is a document granted (sect. 3 of the Act) to any person applying on payment of 10*s*. It confers a personal qualification only. A Government officer (sect. 11 of the Act) determines the extent and position of the claim to which a person or company is entitled under a 'right,' and marks such extent. The officers are called 'Gold Commissioners.'

"3. The 'right' authorizes its holder to mine in and occupy such waste lands of the Crown as may be prescribed under the Regulations. Land so occupied is called a 'claim' (sect. 2 of the Act). The holder of the right is deemed the holder of the claim, and all gold in and upon it is deemed his personal property (sect. 4 of the Act).

"4. These rights, however, whether of mining, of occupation, of ownership of the claim, or of ownership of the gold, are of no effect against Her Majesty, whose rights are thrice reserved in sect. 4 of the Act.

"5. Regulations under sect. 12 of the Act were made on or about the 15th of November, 1866.

"6. A 'reef' is a seam of, say, quartz, containing gold, not alluvial (Reg. 53). Since a reef may appear above the surface of the earth, or out-crop, in places only, its direction or 'line' cannot always be ascertained. Then recourse is had to a 'supposed' (Regs. 55, 56, 58, 79), or 'declared' (Reg. 56) line or direction. The Commissioner marks the line (sect. 11 of the Act, Reg. 56, Reg. 85).

"7. The Plaintiffs claimed 360 feet along the *Glanmire Reef*, *i.e.* 120 feet as the length (Reg. 57) of what is called (by analogy with Regs. 54, 59, and 80) a 'prospecting' claim, and 240 feet as the length of six men's ordinary quartz reef claim (Reg. 58) at 40 feet in length per man. The width of each one man's ordinary claim is 400 feet, 200 on each side of the supposed centre (*ib.*).

"8. The *locus in quo* is in effect found by the jury to be within the Plaintiffs' 360 feet along the actual, and the supposed, and the declared line of reef; and also within their 400 feet of width. That it is on the *Glanmire Reef* itself is undisputed.

"9. The terms 'claim on the line of any quartz reef' (Reg. 58), 'quartz claim' (Regs. 60 and 75), and 'quartz reef claim,' are synonymous.

"10. The Defendants rely, first, on the *locus in quo* being theirs in virtue of their title to the *Monkland Reef.* They say that the *locus* being within a *Monkland* claim, the *Glanmire Reef* is theirs; for they are entitled (Reg. 57) to 'every reef, vein, leader, and all auriferous deposits, within such limits' (Reg. 64).

"11. And so no doubt it would be, were it not for the Plaintiffs' title to the *Glanmire Reef.* But the Defendants do not notice that separate rights may exist in the same land or soil (Regs. 60 and 64), and that the 'trespass' and the 'walls' mentioned in the Regulations (63 and 75) refer only to claims on the same line of reef.

"12. When branches of the same reef converge (Reg. 76), preference is not given until the junction. Up to the junction the several rights under the same surface area of the owners of the separate reefs are preserved. Indeed one branch might for a portion of its course be in the same vertical plane with another.

"13. Still stronger is the inference from the next Regulation (77). When branches of the same reef are regarded as divergent, one vein may be allotted.

"14. Not only is provision made for the convergence and divergence of veins of the same reef, but the case of separate reefs, or 'cross courses' is provided for (Reg. 78).

"15. And even the relations of direction are considered. Thus (Reg. 79)—the case of 'nearly parallel' reefs is anticipated.

"16. In laying off the *Monkland* and *Glanmire* claims, Mr. *King* was Gold Commissioner, and a Justice of the Peace (see sect. 13 of the Act). His decision deals with the reefs as distinct or 'cross,' but provides for their possible identity or 'convergence.' Apart from his marking with the peg, the actual or supposed line of *Glanmire* is known."

* * * * *

"24. The question of 'new locality' (Reg. 57) was determined at the time, and on the spot, by the proper officer.

"25. The Defendants interpret Regs. 57 and 64 so as to make them inconsistent with Regs. 63 and 76, and with the right of the Crown (sect. 4 of the Act) to confer the *Glanmire Reef* on the Plaintiffs. The Defendants have no other title than that given by the Act and the regulations which have the force of law (sect. 12 of the Act; see also sects. 3, 4, 5, 11). It was competent to the Crown to give the Plaintiffs the gold in *Glanmire Reef*, and to make that reef the essence of their claim, with certain attendant easements. This the Crown has done under the regulations. In like manner the Crown had given the Defendants the *Monkland.*

"26. The Court sees no reason to renew this protracted and expensive trial, and perhaps throw doubt on titles at the gold fields. The practice of Mr. Commissioner *King*, in the present case, accords with the views of the Court on the Act and Regulations. To hold that the Regulations are *extra vires*, might, by unsettling titles in all the gold fields of the colony (*Gympie* perhaps being partially excepted, though to what extent cannot be said), lead to serious results. As to the point of possession, there was evidence that the Plaintiffs had a peg at one end of their claim, and were working near the other end. Actual possession cannot in general be had of every part of a reef."

Mr. *H. Manisty*, Q.C., and Mr. *J. D. Wood*, for the Appellants, contended that, according to the true construction of the *Gold Fields Act*, 20 Vict. No. XXIX., and the Regulations made in pursuance thereof, the Respondents had no right to mine within the limits of the Appellants' claim, and the Appellants had a right to mine, as they did, within the limits of their own claim, which was taken up and occupied before the Respondents took up their claim. The Chief Justice misconstrued the Regulations, and misdirected the jury as to the rights of the parties. Even if the Chief Justice's construction were right, the Regulations would be invalid, as being inconsistent with, and contrary to, the 4th section of the Act, which provides that all gold (which by the 2nd section includes quartz containing gold) being in and upon a claim occupied by the holder of a miner's right shall be deemed in law to be the absolute personal property of such holder. The 34th rule in sect. 12 of the amended Rules and Regulations made in 1870, independently of the other Regulations, entitled the Appellants to so much of the *Glanmire Reef* as lies within their claim. As regards the title of the Respondents, the *Glanmire Reef* was not, at the utmost, distant from the *Monkland Reef* 100 yards, and therefore was not a "new locality" within the meaning of the 57th regulation. Moreover, the Respondents' predecessors in title were not, as they allege, entitled to an ordinary claim in addition to a prospecting claim.

The *Solicitor-General* (Sir *H. S. Giffard*, Q.C.), and Mr. *C. Bowen*, for the Respondents, contended that under the Regulations of 1866, the holders of the respective claims were entitled to follow their respective reefs to the prescribed length, and within the prescribed lateral limits, to any depth, but did not acquire any right to interfere (until junction) with any other reef than their own. The Regulations of 1866 contemplate a quartz claim as being something which may run through or under soil not belonging to itself. The surface area, moreover, is dealt with as an area attached to the quartz claim, but not forming part of it. Accordingly, in the case of ordinary, as distinct from reward, claims, the surface area of 200 feet on each side of the line of reef will not be for all purposes a part of the quartz claim, so as to entitle the holder of it to exclusive possession of all other reefs that may pass under the surface area. It will only belong to the quartz claim so far as is necessary to entitle the claimholder to follow the reef laterally along its dip or inclination to any depth within, at all events, that limit. There may be, therefore, under the same surface area several distinct claims or parts of several distinct claims. In the case of converging reefs, the holders of the several reefs, until actual junction, will, it is submitted, be entitled to retain possession of their respective claims, without regard to the question which set of claimholders had the earlier title, a question which is only to arise when the reefs actually unite. It is contended accordingly that an ordinary quartz claim under these regulations consists of a certain specified portion of a reef, which is to be ascertained by lineal measurement on the surface; that the boundaries of the claim, as between themselves and other claimholders, are vertical planes passing through lines drawn through the longitudinal extremities of their claim on the surface, at right angles to the line joining those extremities; that within these claims the claimholder may, as against other claimholders, follow the reef in any direction it may take, subject to a limitation as to 200 feet from the centre of the reef, whether such limitations be general or as against Her Majesty only; and that to every such claim a surface area is attached for the benefit of the claimholders, which area, in the case of converging reefs, may be common to him and his neighbour, and in the case mentioned in regulation 60 may be also common to alluvial miners.

They submitted that neither the Respondents nor their predecessors in title were in any way affected by the new Regulations of 1870, under which they were never registered.

Mr. *Manisty*, Q.C., replied.

The judgment of their Lordships was delivered by

1876
April 7.

SIR BARNES PEACOCK:—

This is an appeal from a judgment of the Supreme Court of *Queensland* discharging a rule *nisi* for a new trial obtained by the present Appellants, the Defendants in the Court below.

The action in which the rule was granted was brought by the Respondents to recover damages for a trespass alleged to have been committed by the Defendants in a close called *Glanmire Prospectors' Claim*, at *Gympie*, in the Colony of *Queensland*, and in a mine of the Plaintiffs, under the surface of the said close, and for taking and removing therefrom certain gold and gold-bearing quartz, and converting the same to their own use.

The Plaintiffs obtained a verdict for £1000 damages, and a rule *nisi* was moved for and obtained by the Defendants upon the ground of misdirection.

The Plaintiff's title is founded upon a claim called by them a prospecting claim, named *Glanmire Reef*. The Defendants claimed a right to take the gold and quartz in dispute under an ordinary quartz claim, called No. 5 *South New Monkland Reef*.

The rights of the parties respectively depend upon the proper construction of the Colonial Act 20 Vict. No. XXIX, intituled "An Act to amend the Laws relating to the Goldfields," and of certain

J. C.
1876
HOLLYMAN
v.
NOONAN.

rules made on the 15th of November, 1866, by the Governor, with the advice of the Executive Council, under the authority of sect. 12 of the said Act.

It may be as well to state here that by the 2nd section of the Act it was enacted that certain terms, and amongst others the word "claim," should have the meanings thereby assigned to them if such meanings should not be inconsistent with the context or subject-matter, and that the meaning assigned to the word "claim" is the portion of land which each person or company shall be entitled to occupy, or to occupy and mine in, under any miner's right, license, or lease, issued under the provisions of the Act. The rules direct that the term "claim" is to be taken to apply to any authorized holding whatever, unless otherwise specified.

By the 3rd section of the Act it was enacted that the Governor in Council might cause documents to be called "Miner's rights" to be issued.

The 4th section is in the following words:—

"The 'miner's right' shall be in force for the period of twelve months from the date thereof, and shall during the said period authorize the holder to mine for gold upon any of the waste lands of the Crown, and to occupy (except as against Her Majesty), for the purpose of residence in connection with the object of mining, so much of the said lands as may be prescribed under the rules and regulations to be made as hereinafter mentioned, and every such holder shall, during the continuance of such miner's right, be deemed in law to be the owner (except as against Her Majesty only) *of the claim which shall be occupied by virtue of such miner's right, and during such continuance as aforesaid all gold then being in and upon the said claim shall (except as against Her Majesty) be deemed in law to be the absolute personal property* of such holder."

The effect of that section, as their Lordships understand it, was not to entitle the holder of a miner's right to mine in any portion of the waste lands of the crown, except such as should be authorized by a claim, license, or lease granted to him under the rules.

Claims were defined, provided for, and regulated by the rules.

They were of various descriptions. Prospecting claims, river claims, frontage claims, alluvial claims other than river claims, and quartz reef claims.

River claims and frontage claims were respectively provided for by Rules 30 to 33, and 34 to 44.

Alluvial claims, other than river claims, were regulated by Rules 45 to 52, by the last of which it was declared that the owner or owners of any alluvial claim *should be entitled to have and enjoy all quartz reefs, veins, leaders, and other deposits of gold within the area of such claims.*

Quartz reef claims are governed by Rules 53 to 90.

The rules are headed "Quartz Reefs."

By Rule 53 the term "reef" is to be taken to mean a *seam* of quartz, or any substance containing gold.

Rules 54 and 55 provide for the protection area to be allowed for prospecting claims, and the mode in which they are to be held.

Rule 57 directs that, "as a reward for the discovery of gold in any new locality, the miner or miners discovering the same shall be entitled to a claim of 120 feet for any distance not exceeding two miles from any known working reef; beyond two miles and not exceeding five miles, 200 feet; beyond five miles, 300 feet on the line of reef, by a width of 300 feet—by a width in each case of 150 feet from centre of such reef; at a distance of 400 yards from any then working shaft on any line of reef, any miner or party of miners shall be entitled to a prospecting claim of 200 feet."

It is to be remarked that by this rule, which, in their Lordships' opinion, extends to prospecting or reward claims only, it is expressly provided that *in all cases the owner or owners thereof shall be entitled to every reef, vein, leader, and all auriferous deposits within such limits.*

By Rule 58. The extent of ordinary claim allowed for each miner on the line of any quartz reef shall be 40 feet in the supposed direction of the same, by a width of 400 feet—200 feet on each side from the supposed centre of such reef; and the total number of claims allowed for any one party of miners actually employed shall not exceed six.

J. C.
1876
HOLLYMAN
v.
NOONAN.

"Rules 60, 61, 63, 64 and 65 are as follows:—

"Rule 60. The holder of any quartz claim shall be entitled to occupy, where practicable, a surface area of thirty feet on each side of his shaft throughout the length of his claim, for the purpose of depositing rubbish and stone raised from the claim: Provided that when any such claim shall run through or under any alluvial or surface soil supposed to contain gold, it shall be lawful for any authorized person to take away or work any such earth or soil; and such person shall remove the same from within the boundaries of the surface area attached to the quartz claim, within a reasonable time, to be determined by the Commissioner.

"Rule 61. Within two days after payable gold has been found in any claim, notice thereof must be given to the Commissioner, who shall lay off the reduced width of such claim, and cause a red flag to be hoisted thereon. This clause applies to every description of sinking, except in cases of prospecting claims.

"Rule 63. Miners occupying any portion of a quartz reef or vein shall be entitled to follow and work it in any direction that such reef or vein may take: Provided they do not trespass upon the claim of any other miner on the same line, or upon ground which may properly belong to the claim of such miner, or upon any part of the walls separating the claims.

"Rule 64. It is provided also, that when the quantity of ground allowed under this regulation cannot be entirely taken up, by reason of the ground deficient being occupied as an alluvial claim, immediately on such deficient ground being vacated the same shall be deemed to be allotted, as a matter of course, to the quartz reef holders, any fresh applications being unnecessary; and the owner or holders of any such amended claim shall be entitled to every reef, vein, leader, and all auriferous deposit within such limits.

"Rule 65. Any miner or party of miners who may be in authorized possession of any quartz claim shall, for the information of all other persons, mark the boundaries of such claim by the erection of six posts—one at each end of it, on the base line, and one at each corner, to be at least three inches square, standing three feet above the ground, and kept at all times clear of rubbish, or anything which may tend to conceal them from view during occupation. And no person shall, on any pretence whatever, remove, destroy, or deface any such posts, nor shall any person erect any such posts with a view of inducing other persons to suppose that such ground is lawfully taken up and occupied."

On the 14th of April, 1868, the Defendants took up and registered an ordinary quartz claim, known as "No. 5, *South New Monkland*." They put a peg at the north end of the claim, and being a party of four, they measured 160 feet or thereabouts, being 40 feet for each of them, in a south-easterly direction, upon what they supposed to be the line of the *New Monkland Reef* or seam of quartz, and there they drove another peg.

The Plaintiffs were the holders of a claim on the *Glanmire Reef*, which was allotted and registered subsequently to the Defendants' claim, viz., on the 1st of July, 1868. They were transferees, and not the original allottees of that claim.

The original allottees, being a party of six, were entitled, under Rule 57, as the discoverers of gold in a new locality, to a prospecting or reward claim on the *Glanmire Reef* of 120 feet. They were also entitled, under Rule 58, to an ordinary quartz claim on that reef of 240 feet, being 40 feet for each of them.

At the time when the claim was first allotted a peg was put into the ground on the line of reef, to mark the northern boundary. The actual direction of the reef was not accurately known at the time, but the Gold Commissioner measured a distance of 360 feet (being the 120 to which the discoverers were entitled as a reward, and 240 to which they were entitled as an ordinary quartz claim), along what was supposed to be the line of the reef, and at the point so arrived at another peg was put in to mark the supposed southern boundary, the practice being to put pegs only at the ends of the length allotted, and not upon either side of the supposed base-line, as directed by Rule 65. Subsequently, the actual line of the reef having become known, the Commissioner caused the extent of the claims to be indicated on the ground by causing another peg to be placed on the line of the reef at a distance of 360 feet to the south of the northern peg, which had never been removed. The new southern peg was some distance to the west of the southern peg originally put in, and was on the actual line of the reef. It was, however, considerably within 200 feet of that part of the line of the *New Monkland Reef* which was in the Defendants' claim.

It was admitted that both Plaintiffs and Defendants held miner's rights.

The Defendants' claim having been allotted and registered prior to that of the Plaintiffs, it is clear that if under their claim they were entitled to all reefs or veins of gold in the earth, at whatever depth, within the lateral limits of their boundary, they were entitled to the gold and quartz in dispute. If, on the other hand, they were not so entitled, and their rights were limited to the gold and quartz in *New Monkland Reef* included in their claim, and the Plaintiffs were entitled to a claim of 360 feet on the actual line of the *Glanmire Reef*, measured from their northern peg, they are entitled to recover in the action.

The Chief Justice, before whom and a jury of four the case was tried, held that the Plaintiffs were entitled to follow their reef—that is, the *Glanmire Reef*—to the extent of their claim, and he left it to them to say whether the quartz taken from the reef was taken from within 360 feet from the northern peg of the Plaintiffs' claim. The jury found for the Plaintiffs.

On discharging the rule *nisi* it was stated by the full Court that the *locus in quo* was in effect found by the jury to be within the Plaintiffs' 400 feet of width (see Cl. 7 and 8).

Their Lordships are of opinion that the ruling of the Chief Justice was right, and that under the *Gold Fields Act* and the Rules of 1866, the holder of a miner's right must, during the continuance of such right, be deemed to be the owner of the claim occupied by him, and that all gold in and upon such claim must be deemed to be the absolute property of such owner.

Secondly. That under the said regulations an ordinary quartz claim did not vest in the holder the right to all gold or quartz beneath the surface area of the claim; and that under Rule 58 such claim was not a block claim, but was confined to the line of the quartz reef to which the claim referred.

Thirdly. That the Plaintiffs' claim entitled them to all the gold in the 360 feet in length of the *Glanmire Reef*, measured from their northern peg; and to follow the line of the *Glanmire Reef* to the extent of 360 feet from the northern peg, in whatever direction it might go, at the least within the lateral limits to which they were entitled, provided that in so doing they did not trespass upon the claim of any other miner.

Fourthly. That in following their reef to the spot from which the gold was taken they would not have been trespassing on the claim of the Defendants, that claim being limited to the line of the *New Monkland Reef*, and the gold and quartz not having been taken on the line of that reef, but from the *Glanmire Reef*.

This view of the construction of the Rules is borne out by the whole scope of them.

The 58th rule, in defining the extent of an ordinary claim, speaks of it as a claim *on the line of a quartz reef*, and though it specifies the width on each side from the supposed centre of the reef, the specification was of the width within which the holder was to have the right to work the reef, which was the subject of the claim, and within which no other holder of a claim was to be entitled to work it.

The view that an ordinary quartz reef claim is confined to the particular reef to which the claim refers, and that the holder of it is not entitled to take gold or quartz from any other reef within the area or limits of the claim is borne out by the fact that the 58th rule contains no words like those of the 52nd and 57th rules, which declare that the owner thereof is entitled to every reef, vein, &c., within his area or limits. It is also confirmed by the 60th rule, which gives the holder of a quartz claim the right to occupy a surface area on each side of his shaft of thirty feet, which is much less than the width specified in Rule 58. Such a provision would have been wholly unnecessary if the claim gave him the right to use and mine in the whole of the soil in the block covered by the surface area. It is also confirmed by the 64th rule, which provides that when the quantity of ground allowed to be taken up under the regulation cannot be taken up by reason of the ground deficient being occupied as an alluvial claim, the quartz reef holder shall immediately, upon the deficient ground being vacated, be entitled to the same, and to every reef, vein, &c., and all auriferous deposits within such limits, thereby putting him in the position of the vacating alluvial claimholder. These rules, as pointed out by the Court below, also shew that it was intended that different rights might exist within the same area or limits.

There are many other rules which support the same view, but it is not necessary to refer to them more particularly. They are pointed out in the reasons given by the Court below for discharging the rule *nisi.* The Rules more particularly referred to are the 63rd and 75th, which their Lordships agree with the lower Court in thinking refer to claims on the same line of reef; and the 76th and 77th, which respectively provide for the convergence of reefs, and for the division of a single reef into two or more distinct veins. In the former case, as pointed out by the Court below, preference is not given until the actual junction of the reefs; and, in the latter case, the holder of the claim may be called upon to elect which vein he will work, and the others may be allotted. Sections 78 and 79, as pointed out by the Court below, also shew that it was intended that a quartz reef claimholder should be entitled to work only one reef within or under the surface limits of his claim.

It was contended by the Defendants that the *Glanmire Reef* was not distant 100 yards from the *New Monkland Reef*, and that therefore the discovery of gold was not in a new locality within the meaning of Rule 57, and that consequently the Plaintiffs' predecessors were not entitled to a reward claim; and further, that they were not entitled to an ordinary claim in addition to a reward claim.

The words of Rule 57 are: "As a reward for the discovery of gold in any new locality, the miner or miners discovering the same shall be entitled to a claim of 120 feet, for any distance not exceeding two miles from any known working reef," &c.

The Plaintiffs' predecessors were, therefore, clearly entitled to a prospecting or reward claim for their discovery of gold; but as the discovery of the *Glanmire Reef* was not in a locality at a distance exceeding two miles from *New Monkland Reef* they were not entitled to a prospecting or reward claim of more than 120 feet in length. It is also clear that they were entitled, as holders of miners' rights, to an ordinary quartz claim in addition to a reward claim; otherwise, a party of miners discovering a quartz reef would be in a worse position than a party who had made no such

J. C.
1876
Hollyman
v.
Noonan.

discovery; for a party of six would be entitled to only 120 feet as a reward claim (Rule 57), whereas a party of six would be entitled to 240 feet as ordinary claims (Rule 58).

Section 6 expressly gives a right to a reward claim *in addition to any other claim which each individual would otherwise be entitled to,* and their Lordships are of opinion that Rules 57 and 58 must be construed as if they had contained similar words.

In the year 1868 a mining district called the *Gympie* Local Court District was formed and proclaimed pursuant to the provisions of the 20th section of the Act, and on the 22nd of October, 1868, a new set of Regulations was made pursuant to the 21st section of the Act, and all Regulations theretofore in force for the management of the gold fields, in so far as they affected the *Gympie* Local Court District, were, with certain exceptions, repealed, and the new Regulations substituted. On the 14th of October, 1870, the Rules of 1868 were repealed, except such parts thereof as defined and preserved existing rights, and amended Rules were made and substituted.

The claims of both parties were situate within the *Gympie* Local Court District, and were registered under the Regulations of October, 1868.

The 34th section of the Rules of October, 1870, was as follows:

> "34. To remove all doubts as to the legality of title to mining property, and for increasing security of tenure, it is hereby declared that all claims *now* or which may hereafter be *registered* in the Registrar's office, of whatever tenure or description, *are block claims, and the owner or owners thereof shall be entitled to hold and enjoy against all persons whatever (except Her Majesty) all reefs, veins, leaders, and other auriferous deposits which may be found within the perpendicular of the pegs marking the surface boundaries of such claim or claims.*"

But by sect. 2 it was expressly provided that the area of existing mining tenements should not be diminished thereby, *nor the nature of the respective holdings changed in consequence thereof.*

Their Lordships are therefore of opinion that the claims of both parties, and their rights and interests thereunder, which were

J. C.
1876
HOLLYMAN
v.
NOONAN.

created before the making of the Rules of 1868 or the Rules of 1870, must be determined with reference to the Rules of the 15th November, 1866, the only Rules which were in force when the claims of both parties were allotted.

The Plaintiffs registered the whole of their 360 feet in the *Gympie* Local Mining Court District as a prospecting claim, but the 360 feet included the 240 feet of ordinary claims, which were to the south of the reward claim. The Plaintiffs are therefore not entitled to the benefit of Rule 57, and their rights in this suit must depend upon their title, not as reward or prospecting, but merely as ordinary quartz reef claimholders.

Looking to their rights as ordinary quartz reef claimholders, and as ordinary quartz reef claimholders only, their Lordships are of opinion that they were entitled to the gold and quartz which were the subject of the action, and to recover damages against the Defendants for removing and converting it to their own use.

There were several minor points in the case, but they, very properly, were not pressed.

For the reasons above given their Lordships are of opinion that the Court below were right in discharging the rule *nisi*, and they will humbly recommend Her Majesty to affirm their decision, and to dismiss this appeal.

The costs of the appeal must be paid by the Appellants.

Solicitors for the Appellants: *Young, Jones, Roberts, & Hall.*
Solicitors for the Respondents: *Trinders & Curtis Hayward.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
June 30;
July 3.

THE QUEEN ON THE PROSECUTION OF THE PUBLIC WORKS LOAN COMMISSIONERS . . . . } APPELLANT;

AND

THE CHURCHWARDENS OF ALL SAINTS, WIGAN, AND OTHERS . . . . } RESPONDENTS.

Mandamus—Public Works Loan Commissioners—Payment of Loan—Limitation of Time—57 Geo. 3, c. 34—5 Geo. 4, c. 36—19 & 20 Vict. c. 104.

12 CLD 355
7 QBD 578
8 QBD 545
9 QBD 499

A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review.

The 5 Geo. 4, c. 36, s. 1, gives to churchwardens and overseers of parishes the power to borrow money from the Public Works Loan Commissioners for the purpose of building or repairing churches, &c., and gives the Commissioners the power to make loans to them for such purposes. It then confers on the churchwardens the power to make rates for the re-payment of such loans, " by annual or half-yearly instalments within the period of twenty years, at farthest, from the advancing of any such sums respectively :"—

Held, that, after the expiration of the twenty years the churchwardens and overseers had no power to make a rate for the purposes of paying money borrowed under the Act, and that, consequently, a mandamus commanding them to do so could not be sustained.

The 15th section of 19 & 20 Vict. c. 104, does not affect this matter.

A power of that sort given in any particular Act must be exercised in exact accordance with the authority given, and the restrictions imposed, by the Act itself.

Per LORD HATHERLEY :—The power given in the 5 Geo. 4, c. 36, s. 1, to the Public Works Loan Commissioners to regulate the mode and proportions of a rate for the payment of a loan made by them, (a power which must be exercised in a reasonable manner,) would prevent the loss of the last instalment, though it might not become actually due until the end of the twenty years.

Per LORD O'HAGAN :—The Legislature having given ample authority and facilities for making the rates so as to secure payment of the loan within the time limited, has created an implication that it did not mean to allow the making of any rate after that time had passed.

THIS was a proceeding in Error on an application for a mandamus to be issued to the churchwardens of *Wigan* (and some other places united therewith, and formerly constituting the parish of *Wigan*), to make and collect a rate in order to discharge a debt due to the Public Works Loan Commissioners. The facts had been turned into a Special Case, which, so far as is material to the present appeal, set forth the following facts:—

The prosecutors were the Commissioners appointed under the 57 Geo. 3, c. 34, "An Act to authorize the Issue of Exchequer Bills and the Advance of Money out of the Consolidated Fund to a limited Amount for the carrying on of Public Works and Fisheries in the *United Kingdom*." The parish of *Wigan* was formerly a very extensive parish, but several of the districts which then constituted it had, since, been duly formed into distinct parishes. The churchwardens and overseers of *Wigan*, and of the other parishes, were the persons against whom the application for a mandamus was made, and all had made returns to the writ.

By the 5 Geo. 4, c. 36, s. 1, reciting several Acts, it was enacted that, "From and after the passing of this Act it shall and may be lawful for the churchwardens, &c., of the poor in any parish in *England* or *Wales*, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, or where any parish shall be under the care and management of any select vestry, or other select body, then with the consent of not less than four-fifths of such select vestry or other select body, with the consent of the bishop of the diocese and the incumbent of such parish, to make application to the Commissioners," &c., under the Acts therein recited, "for any loan or advance" under the powers of those Acts, of "such sum as may be necessary for defraying the expense of rebuilding or repairing or extending the accommodation in any church or chapel of any such parish or district, &c." and the Commissioners were empowered to make any such loan for the purposes aforesaid, under the authority of that Act and the recited Acts, and the overseers, &c., were empowered to receive the same and to apply the same for the purposes mentioned in the application, and, after the grant of such loan, "it shall be lawful for the churchwardens or chapelwardens, and the overseers of the poor in respect of which such loan shall be advanced as aforesaid, and their successors, from time to time, for the time being, and they are

H. L. (E.)
1876
THE QUEEN v. CHURCHWARDENS OF ALL SAINTS, WIGAN.

hereby *authorized and required* to make such annual or half-yearly rates, for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said Commissioners in that behalf, and to assign the rates so to be made as aforesaid as a security for the repayment of the sums so advanced in such manner and form as the said Commissioners shall direct and appoint, and so as to secure the payment of all sums so advanced, with interest thereon at and after the rate of 4 per cent. per annum, by annual or half-yearly instalments on the amount of the principal money advanced, within the period of twenty years at farthest from the advancing of any such sum respectively."

On the 10th of August, 1849, the churchwardens and overseers of *Wigan* duly made an application for a loan, which application was granted by the Commissioners to the extent of £4540; and on the 17th of September, 1849, an indenture of assignment of the rates which should from time to time be made, to secure the payment of the loan with interest, was executed under the authority of, and with the forms required by, the statute. There was a proviso making the indenture void on the payment of £227 in each year, being the full amount of the principal. Four payments were made under this indenture, the last being upon the 17th of September, 1853, these payments amounting to the sum of £908, leaving the principal sum of £3632 unpaid. At a vestry duly convened on the 13th of July, 1854, for the purpose of levying a church-rate, a portion of which was to be applied to the payment of the fifth instalment, the motion for levying a church-rate was refused, and no payment of any instalment had since been made. The Commissioners frequently demanded payment, but did not take any means to enforce it.

The 19 & 20 Vict. c. 104, made provision for the better spiritual care of populous parishes, by the constituting of new parishes, and the 15th section of that Act provided that the incumbent of any new parish should have the same rights and powers as the incumbent of the old parish, and then followed this proviso:— that "nothing herein contained shall be taken to affect the legal liabilities of any parish regulated by a local Act of Parliament, or the security for any loan of money legally borrowed under any Act of Parliament or otherwise."

Some of the districts constituting the old parish of *Wigan* had, before 1849, and some others since 1849, been formed into distinct parishes under Orders in Council, and all had held their regular vestry meetings ever since.

On the 27th of December, 1866, notices were given by the Public Works Loan Commissioners to the churchwardens and overseers of each and all of the districts and townships formerly constituting the parish of *All Saints, Wigan*, requiring them to make rates to satisfy the sum still unpaid. They did not comply with the requisition. A mandamus to compel them to do so was therefore applied for, and, on the 11th of June, the Court of Queen's Bench, after hearing the case argued, gave judgment for the prosecutors, and ordered that a mandamus should issue for making a rate or rates for the payment of £4841. 15*s*. 10*d*. then due. Returns were made to this writ, which returns were demurred to, and the Court of Queen's Bench gave judgment on the demurrers, and ordered a peremptory writ of mandamus to issue. On appeal to the Exchequer Chamber, this judgment was, on the ground that more than twenty years had elapsed since the making of the loan, reversed (1). Against that reversal the present appeal was brought.

The *Attorney-General* (Sir *J. Holker*) and Mr. *Hugh Cowie*, for the Appellants:—

The Respondents are the successors of the churchwardens who applied for the loan, and for whose benefit the loan was made. They are, therefore, the debtors who are bound to pay. To them, by the very words of the statute, the power is given to make a rate, to assign it and to repay the loan, and they are bound to exercise the powers thus conferred on them. The division of the old parish into new parishes does not affect the question of liability, and the 19 & 20 Vict. c. 104, expressly continues the liability on any security for any loan of money borrowed under any Act of Parliament. The provision as to payment within twenty years is merely directory, all that is meant is, that the churchwardens and overseers may, if they can, pay within twenty years by yearly or half yearly payments, or at different times and in different proportions, but if they cannot, they are not released from all liability to pay. That would be a gross injustice. There is nothing in the Act to forbid them paying after that time. It is clear that the provisions of the Act are merely directory, and cannot be construed literally, for, if so construed, there can be no rate applied for as to the last instalment until that instalment is actually due, which would be at the end of the twenty years, and then there would be no power in the churchwardens and overseers to make a rate to meet that last instalment. Here there is an express power to charge the rates by assignment, and that power cannot be affected by a provision which enables the churchwardens and overseers to pay within a specified time. It has been objected that a rate now made would be retrospective, but that is not a valid objection, for a retrospective rate is not necessarily illegal: *Harrison* v. *Stickney* (1). The Legislature may, expressly or impliedly, have authorized it (2). It is impliedly authorized here. There being an indefinite power to make rates to secure the payment of this loan, the exercise of that power in this case would not be illegal. In *Rex* v. *Carpenter* (3), where a delay of this sort took place, it was held that it did not extinguish the debt. The same rule was applied in *Reg.* v. *St. Michael's, Southampton* (4). [LORD O'HAGAN :—But in that case there were no words of limitation as to time. Here they are expressly introduced.] There appears to be that distinction; but the words here are only directory. To the same effect is *Reg.* v. *Hurstbourne Tarrant* (5), and that case is exactly like the present, except that here the delay was a little greater. The extent of the delay was a matter for the exercise of the discretion of the Court of Queen's Bench, and that Court has exercised its discretion and granted the mandamus. [LORD O'HAGAN :—Can that be said to be matter for the exercise of discretion when the words used are prohibitory?] It is submitted that the words are not prohibitory, but are merely directory, since the churchwardens and overseers are told how and when they may make rates, but are not forbidden to make them in another form, and at other times, and in other proportions, should that be found to be more convenient. The interest is overdue; the indenture settled how that interest was to be paid, and in *Rex* v. *St. Michael's, Pembroke* (1) the Court granted a mandamus to compel payment of overdue interest under circumstances such as exist here. The 4th and 5th sections of the statute, which apply to loans to Colleges, illustrate the argument, and assist the interpretation of the 1st, and they do not render the time mentioned absolutely restrictive.

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(1) Law Rep. 9 Q. B. 317, where all the facts and the various Acts are fully set forth.

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(1) 2 H. L. C. 108.

(2) Ibid. *per* Baron *Parke*, at p. 125.

(3) 6 Ad. & El. 794.

(4) 6 El. & Bl. 807. 2 Jur N.S. 1090

(5) El. Bl. & El. 246. 4 Jur N.S. 785

The Court of Exchequer Chamber acted in this case without jurisdiction. All the cases shew that the granting or refusing of a mandamus, which is a prerogative writ, is a matter within the discretion of the Queen's Bench. The discretion of the Court upon a matter entirely within its discretion is not subject to be reviewed.

Mr. *Manisty*, Q.C., and Mr. *FitzAdam*, for the churchwardens and overseers of *Wigan*:—

[Mr. *Lopes*, Q.C., and Mr. *Kenelm Digby*, and Mr. *John Edwards*, Q.C., and Mr. *Charles T. Part*, were for the other parties (parishes which had formerly been part of the parish of *Wigan*), but did not address the House.]

The matter before the Court here was not a matter of fact, and therefore merely for the exercise of the discretion of the Court, but was a question on the construction of a public statute—a matter of law—and was therefore subject to appeal.

The mandamus ought never to have issued, for it cannot be obeyed. The parish officers have now no power to make a rate. Their power to do so was limited to twenty years, and that time has gone by. Within the time specified in the Act payment might have been enforced, it cannot be enforced now. In *Rex* v. *The Churchwardens of Dursley* (2), a rate, to pay a loan for the repairs of a church, was held to be bad because such a rate ought to be raised at the time when the repairs were done, for

(1) 5 Ad. & El. 603.

(2) 5 Ad. & El. 10.

that it was a general rule that rates ought not to be made retrospectively. The power of the Commissioners is gone.

Piggott v. *Pearblock* (1) decides that a power to borrow on the credit of the church-rate does not give authority to create retrospective rates; here the rate would be entirely retrospective, and would therefore be bad. The rule is strict, the rates must be made within the time specified by the Act, and not afterwards. All that Mr. Baron *Parke* said in the case of *Harrison* v. *Stickney* (2) only amounted to this, that all rates existing under special Acts of Parliament must be made in conformity with those Acts, and, consequently, that some retrospective rates might, under the terms of those Acts, 'be sustainable. That is precisely what the Respondents say here, and this Act having, for a particular purpose, given a power to makes rates within twenty years—but only within twenty years—no rates can be made after that time. It was the fault of the Commissioners to delay the enforcement of their rights, and the present churchwardens and overseers had no power to obey the mandamus, which, as it commanded an illegal and impossible thing, could not be sustained.

Mr. *Cowie* replied.

LORD CHELMSFORD:—

My Lords, the determination of the question upon this appeal depends entirely upon the powers of the Public Works Loan Commissioners and the obligations of the churchwardens of *Wigan* under the 5 Geo. 4, c. 36. These powers and obligations are clearly explained and limited by the 1st section of that Act:—[His Lordship read it, see *ante*, p. 612.]

It was argued for the Commissioners that these provisions are merely directory. It is difficult to understand in what sense this is meant, for nothing can be clearer to my mind than the imperative character of the Act to prevent the Commissioners making a loan on any other terms than the one of securing the payment of it by annual or half-yearly instalments within the period of twenty years. It is said that the Commissioners might have directed the rates to be made in different proportions, and also at different

(1) 4 Moo. P. C. 399.

(2) 2 H. L. C. 108, at p. 125.

times in each years. It is true they might, but that, certainly, would not have been so convenient as what they have done in fixing the annual payment at a certain amount, and in requiring in general terms yearly or half-yearly rates to be made. But it is useless to consider what might have been done; the question is whether the parties have acted in obedience to the Act.

The churchwardens by the indenture of the 17th of September, 1849, assigned to the Commissioners the annual or other rates which should from time to time be made under or in pursuance of the direction and appointment of the Commissioners by virtue of the provisions of the 5 Geo. 4, c. 36, with a proviso making void the assignment on payment of the £4540 borrowed, by annual instalments of £227, which would amount to that sum in twenty years. It was argued that by the terms of this proviso the Commissioners might accept, and the churchwardens might pay, the £4540 in any other manner than by these annual instalments.

That proviso provides for the payment, first of all, of the interest on the amount borrowed, "and the farther sum of £227 in or towards the discharge of the said principal sum of £4540, until the whole of the said principal sum of £4540, and the interest thereof, shall be discharged, then and in that case, or on any other acceptance of the said sum of £4540 and the interest thereof, by or under the order or direction of the said Public Works Loan Commissioners, the assignment hereby made as aforesaid shall become absolutely void." Now it appears to me perfectly clear that any stipulation for the payment of the loan, otherwise than is prescribed by the Act, cannot possibly have any effect. The rates having been thus assigned to the Commissioners, rates were duly made for four years, and an annual sum of £227, amounting in the four years to £908, was paid to the Commissioners, the last instalment being paid on the 13th of December, 1853.

It is hardly necessary to advert to the creation of new parishes out of the parish of *Wigan*, as by the 15th section of the 19 & 20 Vict. c. 104, that makes no difference in the question. It is stated in the Special Case that the Commissioners applied from time to time for payment of the instalments subsequently due. The nature of those applications is not stated, nor down to what time they were continued. Nor does it appear that the Commissioners

H. L. (E.)
1876
THE QUEEN
v.
CHURCH-
WARDENS OF
ALL SAINTS,
WIGAN.

in any way acted upon them. The discontinuance of the payment of the instalments was occasioned by the refusal of the vestry in 1854 to lay a church-rate, and no church-rate has been raised in the parish of *Wigan* since.

No proceeding on the part of the Commissioners took place until the year 1867, when the Court of Queen's Bench, upon their application, granted a rule on the churchwardens to shew cause why a writ of mandamus should not issue, commanding them to make a rate or rates for payment of interest and instalments of the principal, secured by the indenture of the 17th of September, 1849. This rule was enlarged in order that a Special Case might be stated for the opinion of the Court. Upon the argument of the Case the Court ordered a mandamus to issue commanding the churchwardens to make, levy, and collect a rate for payment of the sum of £227, one year's instalment of the loan of £4540 due on the 17th of September, 1854, and interest on the balance of the principal sum. Returns were made to the mandamus, which were demurred to. The Court of Queen's Bench gave judgment for the prosecutors on the demurrers, and ordered the peremptory mandamus to issue; which order is now the subject of our consideration. It is unfortunate that there is not the slightest report of any of these proceedings in the Queen's Bench, so that we are deprived of the advantage of knowing the reasons which led the Court to the conclusion that the peremptory mandamus ought to be issued. The Court of Exchequer Chamber has decided unanimously that it ought not to have issued.

In considering the Case it is necessary to clear the way of a difficulty which has been raised as to the power of any other Court to question the issuing of a writ of mandamus by the Queen's Bench, which it is said is a matter entirely of discretion. The Chief Justice of the Common Pleas appears to me to give some countenance to this suggestion. His Lordship says: (1) "There is nothing shewn, save that the money has not been paid; and this it may be, by consent of the Commissioners, though, indeed, some years ago, they appeared to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shewn, and if there was a question

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(1) Law Rep. 9 Q. B. 325.

1 QBD 179
9 QBD 445

whether they had come in a reasonable time, calling on the parish, the same persons as near as might be, to make good their default, then, if the right is discretionary, the judgment of the Queen's Bench on the motion for the mandamus would be final. But no question of discretion of this nature arises in this case." And in another part of his judgment, his Lordship says (1): "The Judges of the Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the Commissioners were entitled to the writ *ex debito justitiæ*, and that no question of discretion arose."

Now there appears to me to have been some little confusion upon this subject, which can easily be removed. A writ of mandamus is a prerogative writ and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ not only upon the merits, but upon some delay, or other matter, personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned. So in cases where the right, in respect of which a rule for a mandamus has been granted, upon shewing cause appears to be doubtful, the Court frequently grants a mandamus in order that the right may be tried upon the return; this also is a matter of discretion. But where the Judges grant a peremptory mandamus, which is a determination of the right, and not a mere dealing with the writ, they decide according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them.

Now, ought this mandamus to have issued? That question depends entirely (as I have already said) upon the Act of Parliament. The Commissioners of Works could only make loans on certain conditions. The churchwardens could only borrow on certain conditions. The conditions upon the Commissioners are that they must lend on security of rates for the repayment by annual or half-yearly instalments within twenty years at the farthest. They have no power to lend on any other terms. The condition on the churchwardens is that they must borrow on the terms of repaying the loan by annual or half-yearly rates within twenty years. They can borrow on no other terms. The intention of the Act with respect to these loans appears to be that the rate-payers in the parish (a fluctuating body) should be chargeable for twenty years with rates in discharge of the loan, but that rate-payers after twenty years should not be liable, which could not be, unless, after the twenty years, the rates were no longer chargeable with the payment of the loan. This is carefully provided for by the direction as to annual payments to be made in twenty years. Now the mandamus issued in 1871 is to levy a rate for the payment of the instalment due on the 17th of September, 1854. This rate must necessarily be levied more than twenty years from the advancing of the loan, and, as it appears to me, in the teeth of the Act. If this can be supported, it will follow that the churchwardens may be called upon year by year for fifteen years from this time to levy rates for the payment of the instalments; for it was considered by the Queen's Bench that the whole arrears can be required to be discharged by a single rate, which, however, would be equally objectionable.

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(1) Law Rep. 9 Q. B. 323.

It is unnecessary to examine the cases which have been cited, none of which appears to me to have any application; nor is it necessary to consider when it was incumbent upon the Commissioners to be active in enforcing their rights, nor whether they had any remedy personally against the churchwardens under the indenture of the 17th of September, 1849. I confine myself entirely to the Act, upon which the whole question turns. And looking to that alone, it seems to me to be perfectly clear that, not by implication only but, by the most express language, it prevents a rate for the repayment of the loan by the Commissioners being made after twenty years from the time when the money was advanced.

I submit to your Lordships that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion after hearing the able arguments which have been advanced at the Bar on both sides of this question.

I may put out of the case at once what I may call the incidental question my noble and learned friend has touched upon, namely, the question of how far the direction of the Court of Queen's Bench is to be regarded as a point of discretion on the part of the Court. I entirely agree in the view taken by my noble and learned friend, that when the Court of Queen's Bench is invited to make an order by way of peremptory mandamus, it is no more in the power of that Court than of any other Court, to direct that to be done which is not lawful. Upon a prerogative writ there may arise many matters of discretion which may induce the Judges to withhold the grant of it—matters connected with delay, or possibly with the conduct of the parties—and when the Judges have exercised their discretion in directing that which is in itself lawful to be done, I apprehend that no other Court can question their discretion in so directing. But with regard to that which is in itself not lawful to be done, they are open to correction, as every other Court is, by the Court of Appeal, or by a higher authority.

The question we have really to consider in this case is, whether or not that which the churchwardens were, by the mandamus in question, directed to do, was a thing which the churchwardens could by law be ordered under any circumstances to do. That must depend entirely upon the authority derived from the special Act of Parliament under which they professed to act. Undoubtedly they have not at Common Law any right to raise, or direct to be raised, a rate which is for purposes in themselves retrospective. The principle of that is very clear. It is not right, on the one hand, that those who have had the benefit of work done should be exempt for several years, and perhaps exempt altogether, from making any contribution to the expense of the work, and should throw upon those who succeed them the whole of those expenses. And again, as regards the general law, it has been held that, with reference to retrospective rates, except under special powers contained in special Acts of Parliament for the purpose, it is not right to throw any past expenditure upon a succeeding class of inhabitants of the district affected by the work.

But it was found by the Legislature that there were certain works, of a permanent character, which it might be wise to execute, and in such cases those who came after would have the benefit of those works; and therefore, from time to time, Acts of Parliament have been passed to authorize such works, and public moneys have been vested in certain Commissioners called the Commissioners of Loans to assist in executing them. These Commissioners have been authorized to make advances under Acts of Parliament, but Parliament has at all times carefully made provision, according to what seemed to be right at the moment, for the payment of those moneys by charges which would affect subsequent inhabitants of the district obtaining the benefit to be secured by the advance of a loan. Among other things the object of building or repairing churches has been considered to be a proper object for such advances. And accordingly in the Act of Parliament now before us, among various objects for which the power is given of charging the rates upon the parish, we find that one is the repairing of churches, the object in the case we have before us to-day. Another object (dealt with in the 3rd section of the statute) is the building of new churches, and another is increasing the accommodation for students in colleges at the universities. But in all those cases very careful provision is made for the mode in which the loan is to be raised, and the security to be given, and the payment made.

My Lords, we find in the first clause of 5 Geo. 4, c. 36 (which is the clause we have to construe now, the loan being one for the repairing of a church), that provision is made in the first place that the Commissioners may lend moneys, and in the next place that the churchwardens and the overseers may receive a loan; but under certain provisions as to consents and the like which have been complied with in this case; and they having received the loan, then comes this clause under which the Commissioners must now seek the payment of the money lent, if they can obtain it at all:—[His Lordship read the section, observing upon the word *required* as marking that the duty imposed on the churchwardens and Commissioners was imperative.]

Now, my Lords, without looking in the first instance to the deed which has been executed under the authority of this section, let us just see what the authorities and powers of the churchwardens were. They could do nothing except under this Act; what did the Act authorize them to do. They were authorized to assign the rates, and they were authorized to assign them in such a manner, and the instalments of the loans were to be payable in such proportions, and at such times, as should be directed by the Commissioners. But both the Commissioners and the churchwardens were limited, plainly and distinctly, by the close of this sentence, which tells you in what manner the repayment of the loan was to be secured. It was to be paid, with interest thereon, by instalments spread over a "period of twenty years at farthest" from the advance. It appears to me that they could therefore give no security beyond a security for the payment within that particular time; they could give no security which should postpone the payment, by instalments or otherwise, to any later period than twenty years from the advance.

In giving to the Commissioners full authority to direct how and in what form the annual or half-yearly payments should be made, the Legislature appears to have thought a public body like the Commissioners could be entrusted with the power of seeing that all should be done justly and fairly. Otherwise it might be said that it would be possible, under the particular words of this section, for the Commissioners to say: You can begin to pay the instalments at the tenth year from the date of the advance, paying none in the interim, and so by means of an operation of double instalments, as it were, secure the payment of the advance by the end of the twenty years. But, my Lords, I apprehend that that would not be a reasonable exercise of their duty, and it would not be one which we ought to impute to them, or which the Legislature contemplated as possible on the part of the Commissioners. I make the observation that they have considerable powers given to them as to proportions, and as to times; for the proportions and the times are to be such as the Commissioners may direct; and I apprehend that that power was given for the express purpose of enabling the Commissioners, in a reasonable and proper manner, to take the best steps they could for securing to themselves the payment of the money within twenty years from the advance. They would have to see what a reasonable rate, to be raised in each succeeding year, would be in the particular parish in question—whether there should be an increase or a diminution in the amount, according as the parish might increase or might diminish in population, or the like.

At all events this power furnishes an answer, among other things, to the objection which has been raised as to the difficulty that might occur with respect to the payment of the last instalment, that difficulty having been of this description. It was said in the course of the argument: "You cannot apply for a rate until the money is due, and if the last instalment will be due at such a time that you cannot secure to yourself the payment by a rate, you will have to lose the last instalment altogether." It is an answer to that to say that the Commissioners have power to make such arrangements as to proportions and as to times of making payment as would enable them to have the last instalment paid by means of a rate levied at a time when it would fall within the twenty years. Under this provision in the Act arrangements could be made whereby the Commissioners could secure themselves against a loss of that description.

Then we come back again to the question, what is the power the churchwardens have of levying rates, and what is the power the Commissioners have of directing payments? They appear to have acted very properly in their mode of having the deed prepared. I need not go through its details. The deed is so prepared as to recite that it is intended that the payment shall be made in the manner and in the proportions afterwards directed by the Commissioners. Then there comes the assignment of the rates. Then there is a provision which would be called in an ordinary mortgage deed a proviso for redemption, which points out the particular periods at which the instalments shall be paid. The deed being dated August, 1849, the first instalment of a portion of the principal, together with interest, is directed to be paid in September, 1850; and then in each succeeding year the payments of £227 of principal, and an amount of interest, diminishing in proportion as the debt itself would diminish, are to be paid by successive instalments. If everything had been rightly and properly done according to the provisions of the deed this would have been the mode of paying off the debt. Then it says that the deed will be completely avoided by paying all those instalments. My Lords, I apprehend that that was a very proper form of deed, and I apprehend that all that can be claimed by the Commissioners is that which alone the Act authorizes them to receive, and that which they have provided should be paid to them by their deed.

The case is clear of all the authorities which have been cited, because they appear to have been decided upon the simple ground that if there is an express power of charging indefinitely the rates, that power will not be diminished because there is a provision made for the payment of the debt in a certain manner, there being no proviso that if the debt is not paid in that manner the debt is to be acquitted or discharged. If there is a charge upon the whole of the rates indefinitely, and in perpetuity, then the mode of making the payment which is pointed out will not invalidate the charge. But if you find in an Act of Parliament like this, only one particular mode and one particular power of effecting the object, and that power cannot now be farther pursued because the time has been allowed to pass, then, my Lords, I apprehend that all one can say is that the security is not one which will be effective farther than the very form and extent in which it is framed, which must be in pursuance of the Act, and that therefore the Commissioners, having been directed to take steps to provide for the payment of these sums as they become due, cannot now, in the year 1874, obtain payment of those instalments which were payable under the deed in the year 1854.

I do not think that any argument arises from any of the other clauses in the same Act of Parliament. In fact it is only *idem per idem* to a great extent. If anything, they would rather incline my mind against the view contended for by the Appellants, because, after the 4th section of the Act has directed that the colleges shall have the power to borrow money and make provision by their deeds for the assignment of the college property, so that the debt may be paid off, like parochial debts, in the coure of twenty years, the following section, the 5th, contains an express proviso that no other instruments and no other powers of charging college estates shall have any effect under the Act. The other matters contained in the Act do not induce me to believe that we are wrong in coming to this conclusion.

LORD O'HAGAN:—

My Lords, I concur in the judgment of the Exchequer Chamber, but I do not desire to be understood as adopting all the reasons on which that judgment was grounded.

H. L. (E.)
1876
THE QUEEN v. CHURCH-WARDENS OF ALL SAINTS, WIGAN.

Twenty-seven years have elapsed since the loan was made of which the Public Works Commissioners now seek the payment, and twenty-two years ago the parishioners of *Wigan* and the adjacent townships appear to have repudiated liability for that loan, and declined to pay any instalments upon it, and have ever since been allowed by the Commissioners to succeed in their passive resistance to a claim, which was apparently made more than once, but when exactly, how often, or under what circumstances, your Lordships are not at all informed. The Commissioners in no way account for this singular delay and inaction, which is the more remarkable as the statute (5 Geo. 4, c. 36), casts upon them the duty of enforcing the discharge of the debt by yearly or half-yearly rates, "in such proportions and at such times" as they should think proper "to direct and appoint." Within the lengthened period during which the Commissioners have been so strangely quiescent, it is stated in the various returns to the mandamus, and not denied, that several districts have been severed from the parish to which the loan was made, on the requisition of a majority of its inhabitants, and have become separate parishes for the purpose of levying rates, and entitled to the benefit of the exemption from liability to contribute to the repair of their former parish churches, under sect. 71 of 58 Geo. 3, c. 45, after twenty years from the dates of their consecration. So that if the contention of the Appellants could be sustained, the debt incurred by one set of people would be enforced against another. Those who received the benefit will not bear the burthen. A new generation, affected by new Acts of Parliament, and holding a new ecclesiastical position, will be visited with the well defined and limited liability of their predecessors, in whose enjoyment of the advantages to which it was originally referable they may not, possibly, in their new circumstances, participate at all. And all this seeming injustice will be occasioned because public officers have failed to do their duty in enforcing a public claim, not from any want of power to do it, or upon any suggestion that the parish which contracted to pay under the statute, year by year, had not ample means available for the purpose, but from the unexplained and unwarrantable neglect to take effectual proceedings which would have been easy and simple, and must have been effectual.

In this state of facts we come to consider whether the terms of the statute require us, at this time and after all the events which have taken place, to give effect to a claim, so questionable in its staleness, and in its practical operation, if it could be established, so capable of working injustice.

I quite adopt the view of the Attorney-General that a retrospective rate is not necessarily illegal, and that if this be a case of the exercise of discretion by the Court of Queen's Bench *cadit quæstio.* Neither the Exchequer Chamber nor your Lordships' House would then have power to interfere, and the Appellants must prevail. But for the reasons already given, there was no exercise of discretion here which could oust the control of this House. In any view the statute, if rightly construed, does not warrant a retrospective rate, but contemplates, and requires, that the loan should be paid from rates leviable within a specified period; then the argument as to discretion does not arise, and we are bound to enforce the intention of the Legislature. The *dictum* of Mr. Baron *Parke,* on which reliance has been placed, not only in the Court below but by the learned counsel who have addressed your Lordships, points to that intention as the determining consideration in the case; and if it be, as I think it is, the words of the Act seem to me decisive.

The 1st section, by the imperative words "it shall be lawful," casts on the churchwardens and overseers the duty of making, for the payment of the loan obtained on the demand of a majority of the inhabitants of the parish, or of four-fifths of the select vestry, if there be such a body, "such annual or half-yearly rates" for the payment of it "in such proportions and at such times as shall be directed and appointed" by the Commissioners, and to assign them so as to secure the payment of all sums so advanced, "with interest," by annual or half-yearly instalments, "within the period of twenty years at farthest," from the advancing of such sums. Could a clause have been framed with more elaborate care to secure the payment within the twenty years? It has not a negative provision but its affirmative words are very stringent. The rates are to be made "so as to secure repayment"—of what?—"of *all* sums," that is, of everything which has been advanced "within the period of twenty years." This seems clear enough, but to render the purpose of the Act, if possible, more unmistakeable, it adds "at farthest," and fixes the period so as to make it run from the time of the first advance made to the parishioners.

And this emphatic declaration of intention to have the payment made within the twenty years is repeated over and over again in the 3rd and 4th sections with equal force. I decline to give an opinion upon the construction of those sections, because it is not required for the case which is now before the House. I therefore withhold any opinion, as has been done by my noble and learned friend opposite (Lord *Hatherley*). But if an opinion were to be given at this moment, I should say that the other sections ought to be construed as I construe the 1st section, and not according to the view presented by the Attorney-General and by Mr. *Cowie*, that those two sections ought to be interpreted as not limiting the period of payment.

I do not know how language could have made the intent more clear, and I can see no sufficient reason for holding the clause directory. Words, though affirmative, are not necessarily so if they are "absolute, explicit, and peremptory," and so, in my opinion, they are here. No doubt express words forbidding any action after twenty years might have been added, and then there would have been no room for controversy. But Mr. Baron *Parke* thought, of course, that the prohibition of a retrospective rate might be made impliedly or expressly. And if the intention here is indicated by words which are unequivocal, and if the Legislature has supplied all facilities for carrying that intention into effect by compelling the parish to make the rate, and arming the Commissioners with ample authority to regulate the making of it, so as to have full payment assured within the time specified, the implication seems to me natural and reasonable that the Legislature did not mean to allow the making of it after that time had passed.

I, therefore, agree with the Exchequer Chamber as to the construction of the statute, and I do so the more willingly because it is in manifest accordance with its policy, and as I conceive essential to its equitable operation. It is of importance that public officers should not be encouraged to sleep at their posts, and postpone the fulfilment of their duties, in the expectation that their delay will be condoned and their demands conceded, whatever may have been the lapse of time or the change of circumstances. It is important to the community that the public funds advanced for meritorious purposes should not be lost from neglect in enforcing payment for them; and it is of equal importance that persons who never sought the advance, or desired benefit from it, should not be made responsible when those who, at their own instance, became liable have passed away.

As to the 15th section of the 19 & 20 Vict. c. 104, it leaves the "legal liabilities" of borrowers under Acts of Parliament where it found them, and does not, in my judgment, operate in the least to revive the claim of the Commissioners if it ceased to be enforceable at the end of the twenty years.

As to the authorities which have been cited for the Appellants, my noble and learned friends have dealt with them sufficiently. In all cases of construction like this the specific terms of each statute must be carefully considered, and those authorities will be found to apply to Acts quite distinguishable from that before us. Lord *Coleridge* has pointed out that in *Reg.* v. *St. Michael, Southampton* (1) and *Reg.* v. *Hurstbourne Tarrant* (2) the amounts in question were charged upon the rates, whereas in this case they were not. In the first of these cases Mr. Justice *Erle* relies on the fact that the obligee of the bonds was not required to enforce annual payments, as he hopes, in justice towards future ratepayers, future legislation may provide. In the second case, Lord *Campbell* takes notice of the fact that the rates are charged; Mr. Justice *Erle* and the other Judges note that no duty to enforce payment is imposed on the bondholder; and Mr. Justice *Erle* says: "It would, I think, be highly satisfactory if it were, in all such cases, made obligatory on the creditor to enforce payment at once. If the Act had said that the charge should be paid off within five years, and not otherwise, it would have made it the duty of the creditor to secure it in time." Here the Act clearly says that the debt shall be paid within twenty years, and within twenty years "at farthest," and the Commissioners get power to have payment made "in such proportions and at such times" as they shall direct and appoint. I shall only add that in those cases, and in every other which has been relied on, the phraseology of the Acts has been very different from that with which we are dealing, and in none of them will be found the strong, clear, and unequivocal limitation which warrants us in adopting a view consonant, in my opinion, at once with legal principle and natural justice.

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(1) 6 El. & Bl. 807.

(2) El. Bl. & El. 246.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 3rd July, 1876.

Solicitors for the Appellant: *Barnes & Bernard.*

Solicitors for the Respondent: *Paterson, Snow, & Burney; Sharpe, Parkers, Pritchard, & Sharpe.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
July 10, 11.

WILLIAM MANLEY HALL DIXON . . . APPELLANT;

AND

THE LONDON SMALL ARMS COMPANY, LIMITED . . . . RESPONDENT.

Patent—Infringement—Crown—Servants or Agents.

The Crown has the right to the use of a patented process or invention without compensation to the patentee.

Per LORD SELBORNE:—This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subjects only, and not against the Crown.

A patent in the usual terms was granted for an improvement in the manufacture of fire-arms. The Secretary at War issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, *minus* the cost of the steel barrels and the stocks, which the War Office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, and they might be rejected by officers at the War Office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:—

Held, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the Crown.

Feather v. *The Queen* (1) considered, and assumed to be rightly decided; but not to be extended.

THIS was an appeal against a decision of the Court of Appeal, by which a judgment of the Court of Queen's Bench had been reversed.

The Appellant, Mr. *Dixon*, as managing director of *The National Arms and Ammunition Company, Limited*, was the holder of certain patents for improvements in the manufacture of small arms known as the *Martini-Henry* rifles. The Respondents were the persons forming the *London Small Arms Company, Limited*, and carried on business at the *Victoria Park Mills, Old Ford.* The Appellant brought an action against the Respondents alleging that they had used his patented inventions in the rifles supplied by them to the Government, and he sought compensation for the infringement.

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

It was referred to a barrister to state the facts in a Special Case. The Case set forth that about the 16th of April, 1872, in answer to an advertisement issued by the Secretary of State for War, the Respondents sent in a tender for the supply of 13,875 *Martini-Henry* rifles, which tender was accepted, and the rifles had since been supplied under the contract, and accepted by the Secretary of State for War for the use of Her Majesty and the public service. In the manufacture of these rifles the methods of the Plaintiff's patents applicable to the locks were employed, and it was in respect of such employment of them that the Plaintiff claimed compensation. The case stated that, "for the purpose of raising the question of law, but for no other or farther purpose, the Defendants agree that the rifles so manufactured for, and accepted by, Her Majesty's Secretary of State, under the said contract, would, but for the fact that they were manufactured and delivered to Her Majesty's said Secretary of State for the public service and use of Her Majesty, and under the contract as aforesaid, have been infringements of the said letters patent."

The patent was for improvement in the manufacture of breech-loading fire-arms, and contained the usual provision granting the exclusive right to the patentee, "his executors, administrators, and assigns, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the patentee, his executors, administrators, and assigns, shall at any time agree with, and no other (1), to use the said invention." It also contained the usual prohibition against "any person, bodies politic and corporate, and all other our subjects within the *United*

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(1) In the course of the argument the Lord Chancellor suggested that in order to ascertain the meaning of the Legislature there might, after the words "and no others," be assumed to be added these words, "excepting officers and servants of the Crown acting on behalf of, and for the use of, the Crown." The Solicitor-General proposed to insert the word "agents," so that the passage should read, "officers, agents, and servants;" and the Lord Chancellor assented to the proposal. See his Lordship's remarks on this matter in his judgment. (post p 641)

Kingdom," &c., using the invention during the term of fourteen years granted in the patent, except with the license of the patentee or his executors, &c. There was a provision that if the patentee "shall not supply, or cause to be supplied, for our service all such articles of the said invention as he shall be required to supply by the officers or ministers administering the department of our service for the use of which the same shall be required, in such manner and at such times, and at and upon such reasonable prices and terms as shall be settled for that purpose, by the said officers or commissioners requiring the same, that then, or in any of the said cases, these our letters patent, &c.," shall be void.

By the terms of the contract the Respondents bound themselves to supply and deliver the articles described in a schedule according to patterns which were to be supplied from the Crown stores. The articles supplied were to be examined by officers, who had the power to reject them.

The schedule referred to was in the following terms: "13,875 rifles, *Martini-Henry*, without swords, bayonets, or scabbards, at £3. 10*s.* each, less 7*s.* 6*d.* each for steel tube and 2*s.* 2*d.* each for stock." Patterns were to be seen at the *Royal Small Arms Factory, Enfield.* "Materials for barrels and stock to be issued from the Government stores." The viewing during the process of manufacture was to take place at *Old Ford.* "The deliveries of these rifles are to commence six months after receipt of correct patterns and gauges, and to proceed at the rate of 1200 per month," the whole to be completed by the 1st of July, 1874 (1).

The case was argued in the Court of Queen's Bench, and the Judges there, on the 26th of January, 1875, gave judgment in favour of the Plaintiff (2). On the 25th of February, 1876, the Court of Appeal reversed that judgment (3), and this appeal was brought.

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(1) The following minute was on the books at the War Office: "That the companies shall be protected by this department against the patentees in the manufacture of the arms to be contracted for." It was not stated that this minute was communicated to the Respondents before the contract, or had formed part of the contract. But it was stated that the case for the Respondents was really argued on behalf of the Government.

(2) Law Rep. 10 Q. B. 130.

(3) 1 Q. B. D. 384.

Sir *W. V. Harcourt*, Q.C., and Mr. *Aston*, Q.C. (Mr. *Macrory* was with them), for the Appellant:—

The object of this appeal is to consider the authority, or, if that is deemed to be established, the applicability to this case, of *Feather* v. *The Queen* (1). It is submitted that that case is not to be supported; but, at all events, the doctrine there laid down is, as it was said in the present case in the Court below, "not to be extended." Secondly, it is submitted that, assuming that case to lay down the law correctly, still no private person can use (as of course) a patented process, merely because the article on which he uses it is to be supplied to the Crown. And, thirdly, it is submitted that, supposing the Crown to have the power to authorize a private person so to use a patented process, it has not given any such authority in the present case.

[THE HOUSE desired the learned counsel to confine their arguments to the second and third points.]

Arguments continued. The Crown here did not make a contract with the Respondents to manufacture articles of a certain sort, after a certain mode of manufacture. The statement in the plea to that effect is erroneous. The contract was to provide and deliver. That contract might have been fulfilled to the letter without the Respondents manufacturing anything. They might have made a contract with the Appellant, or with any one of his licensees, to manufacture the article, and could then have satisfied their own contract by supplying to the Crown the already manufactured article. This consideration, therefore, renders the case of *Feather* v. *The Queen* (1) inapplicable.

But, still assuming the case of *Feather* v. *The Queen* (1) to have been rightly decided, there is another ground on which it is inapplicable to the present. The Crown may have a right freely to use a patent without remunerating the patentee; but the Crown can only so use it by its own officers or servants. The Respondents were not the officers or servants of the Crown, but were mere contractors who undertook to supply certain manufactured articles to the Crown.

It will be argued that there is no difference between a person who contracts with the Crown to do work for the Crown, and a

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

person who is an officer or servant of the Crown. But the distinction exists, and is considerable. To deny that distinction would be a dangerous doctrine for the Crown, for to hold that all persons who do anything for the Crown are to be considered its servants, might introduce all the consequences of that doctrine, as to the liability of a master for the acts of his servant, which was the subject of consideration in *Laugher* v. *Pointer* (1). Then, if contractor with the Crown, and servant of the Crown, are not the same, so far as the liability of the Crown is concerned, they cannot be the same for any other purpose; certainly not so for giving the contractor privileges and advantages which, if the Crown possessed them, could only be given by the Crown to its own officers and servants, working for its purposes, and acting under its direct control.

The Crown supplied these contractors with the barrel and the stock. What they added of their own was something manufactured by the patented process of the Plaintiff, and for the use of that process the contractors had given him no compensation. They might have bought the patented article from the patentee, or from one of his licensees, but they made it in their own workshop, without his license and without any payment to him for its use, and he was therefore entitled to compensation.

They had no right to do this; and, assuming that the Crown had the right to do it, the Crown had not by the contract conferred (and, it might be contended, could not by any contract confer) the right on the contractors. The Crown gave the profit to the patentee as a payment for the value of his invention. It could not, as a matter of caprice, take away from him the source of that profit and give it to some one else. That would be to defeat its own grant to one subject for the profit of another, which it cannot do. It is contrary not only to the spirit of the *Act of Confirmation of Grants*, 43 Eliz. c. 1, but is in direct contradiction to the words of the patent itself, which says that it is to be construed in a sense the most favourable to the patentee. But, even if the Crown did possess this extraordinary right of conferring on one subject the power to render nugatory a grant it had made to another, it had not done so in the present instance.

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(1) 5 B. & C. 547.

It is therefore submitted that, if the Crown by any implied reservation of right in the grant of a patent may, without compensation to the patentee, use the patented process, it cannot grant that right to any subject for his own individual profit, and that in this particular case it has not by its contract with the Respondents affected to confer on them such an advantage.

The Solicitor-General (Sir *H. Giffard*), and Mr. *C. Bowen*, for the Respondents :—

The infringement complained of here, is the mere use of that particular part of the invention which consists of the application of the lock to the stock and barrel—that was a part of the manufacture of the rifle—and the act of manufacturing was done for the Crown. The contract itself shews that to be so. The Respondents were bound to make the whole rifle, the Crown supplying some of the materials for the manufacture, but at the making of each portion the Crown had a right, by its examining officers, to intervene and examine the work. That shews that a manufacturing was intended and contracted for. Everything proves that the Crown required the work to be done for itself and in the public service. Then the work is protected under the authority of *Feather* v. *The Queen* (1), and public policy required that it should be so protected. [LORD PENZANCE referred to the minute in the War Office, which declared that the contractors should be protected against the patentees.—Sir *W. Harcourt* observed that that declaration was not properly in the contract itself; but even if it had been there originally, it would, as Mr. Justice *Mellor* said (2), make no difference whatever in the matter.]

Argument for the Respondents continued :—The Respondents here were acting as the servants of the Crown. It can make no difference, with regard to their possessing that character in this particular matter, whether they were or were not persons in the ordinary and daily service of the Crown. They were in its service for the purpose of making these rifles; they were to obey its orders, and if they did not, might be punished by the rejection of the article produced. Everything was to be done directly under

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

(2) Law Rep. 10 Q. B. at p. 136.

H. L. (E.)
1876
DIXON
v.
LONDON
SMALL ARMS
COMPANY.

the authority of the Secretary-at-War—that is, the authority of the Crown. Then the Secretary-at-War, that is, the Crown, is alone responsible to the Appellant here, for the mode in which that work is done; for *Gibson* v. *Brand* (1) decided that when *A.* gave orders to *B.* to manufacture an article according to a patented process, *A.* who gave the order, and not *B.*, who executed it, was liable for the infringement. And the same principle was acted upon in *Ellis* v. *The Sheffield Gas Company* (2). So that both these cases go to establish that the employer is the person liable, the mere executant of the work being his servant and agent. [THE LORD CHANCELLOR here suggested the introduction into the patent of the words already referred to (see *ante*, p. 633), and the argument proceeded on the assumption that they were introduced.]

Assuming then, that if the Respondents were agents of the Crown, that is, persons doing this work for the Crown, on the order of the Crown, and for the service of the Crown, it is clear that they cannot here be personally responsible to the Appellant. The Crown, which employed them, employed them as its agents, and is alone responsible for the acts of its agents. That principle of the liability of the employer was fully sustained by the Court of Exchequer Chamber in *Gray* v. *Pullen and Hubble* (3), where a person having under statute a power to order a thing to be done, employed a contractor to do it, and the contractor did it, but did it so negligently that a mischief happened. In an action for damages by the person who had suffered the mischief, the Court, reversing a judgment of the Court of Queen's Bench, held that the employer was personally responsible and not his agent. And that was in conformity with *Hole* v. *The Sittingbourne and Sheerness Railway Company* (4). In that case a railway company which had the power and authority to build a bridge, employed a contractor to build it, and as the bridge occasioned an injury to a shipowner, the company was held responsible to him. Mr. Baron *Martin's* observations on the case (5) are very strong upon the point. It is not necessary to make one man liable for the act of another, that the relation of principal and agent should, in strict-

(1) 4 Man. & G. 179.
(2) 2 El. & Bl. 767.
(3) 5 B. & S. 970.
(4) 6 H. & N. 488.
(5) At p. 498.

18Jun 146

H. L. (E.)
1876
DIXON
v.
LONDON
SMALL ARMS
COMPANY.

ness, subsist between them. The above cited cases apply, in principle, here. Here the employment was by the Crown, the work was done by the order of the Crown, and in the service of the Crown, and for the use of the Crown and the public. Then the rule laid down in *Feather* v. *The Queen* (1) applies, and the Respondents cannot be made personally responsible.

Sir *W. V. Harcourt* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the question in this case is one of great importance to the parties concerned, and of considerable general interest. It has been very elaborately argued at the Bar; but I think you do not entertain any doubt as to the conclusion at which you should arrive.

I will remind you that the Respondents undertook to manufacture for the Crown through one of its departments, the department of the War Office, a certain number of rifles. The Appellant is the owner of one or more patents connected with the manufacture of small arms. He complains that the Respondents, in executing the order to which I have referred, have infringed his patent rights. For the purpose of the argument it is admitted between the parties that the patents belonging to the Appellant are to be taken as valid; and that it is also to be taken, for the purpose of the present argument, that if those rifles had been supplied to any subject in this country, the manufacture of them was of such a kind that it would have been an infringement of the patent rights of the Appellant. That narrows the question considerably, and it is still farther narrowed, for it has been insisted on the part of the Appellant, and was not, so far as I could understand, controverted by the Respondents, that the part of the rifles manufactured which is an infringement (at all events, for the purpose of this argument) of the rights of the Appellant, is that which is called the breech-action, or the lock of the manufactured rifle.

My Lords, bearing those matters in mind, I may add that the Respondents contend that they are not answerable to the demand of the Appellant for these reasons. In the first place, they say that it must be taken as established by the case of *Feather* v. *The Queen* (1), decided in the year 1865, that the Crown is not bound by the monopoly created through the grant of letters patent; and they contend that in manufacturing these rifles under the order to which I have referred, and to the particular wording of which I shall presently advert, they were manufacturing the rifles for the Crown, and that, whatever exemption from the stringency of letters patent existed in the Crown, they are entitled to, and that consequently they are not answerable to the claim of the Appellant. My Lords, to that the Appellant replies by three propositions. In the first place, he asserts that the case of *Feather* v. *The Queen* (1) was not properly decided; and he contends, as he is entitled to do, that it is an erroneous decision. In the second place, he contends that even supposing that case to have been rightly decided, yet that in the present instance the Respondents were not in the position of servants or of agents of the Crown, and entitled to the privilege of the Crown. And, in the third place, he contends that even if that was their position, in point of law and in point of fact, still, in this particular case, having regard to the wording of the contract between them and the Crown, the privilege of manufacturing free from the rights of the patentee was not passed by the Crown to them, or intended by the Crown to be exercised by them.

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

My Lords, when these propositions on the part of the Appellant were stated to your Lordships, you determined that, in the first instance, at all events, you would hear the argument upon the second and the third of those propositions, and not upon the first. The argument has proceeded upon that footing, and I think your Lordships will be able to dispose of the case with reference to the argument upon those second and third propositions. I advert to that for the purpose of making it clear that your Lordships will assume, without finding it necessary to declare, that the case of *Feather* v. *The Queen* (1) was properly decided.

My Lords, I have spoken of the second and the third propositions in the argument of the Appellant; but in point of fact I think you will find that those two propositions really centre themselves in the second. I think when your Lordships have adverted to the position of the Respondents in this case with reference to the Crown—a position which must be tested and judged of by the wording of the contract—you will be able to arrive at a conclusion one way or the other, whether the Respondents were in fact and in law the servants and the agents of the Crown. If they were the servants and the agents of the Crown, acting on behalf of and for the use of the Crown, then it may be that they would have the privileges with reference to the patent which the case of *Feather* v. *The Queen* (1) decided to remain in the Crown, even although there is nothing whatever in the contract expressly taking notice of those privileges, or authorizing the Respondents to exercise them.

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(1) 6 B. & S. 257; 36 L. J. (Q.B.) 200.

My Lords, I have used the words "servants or the agents of the Crown" for this reason. The case of *Feather* v. *The Queen* (1) decided that although every grant of letters patent communicates in general terms to the patentee the right, and the sole right, to use and to exercise the invention, and prohibits other persons from using or exercising that invention, yet that a grant of that kind, being a Crown grant, must be construed with reference to those principles which regulate Crown grants, and that that which appears from its wording to be a general privilege and a general prohibition must be read with an exception in favour of the Crown itself; and inasmuch as an exception in favour of the Crown itself cannot be a personal exception, for the Crown itself could not exercise patent rights, the exception must be not only in favour of the Crown, but in favour also of those who act on behalf of, and as the agents of, the Crown. I, therefore, in the course of the argument, took the liberty of proposing to the Solicitor-General the insertion of words in the letters patent which would indicate the decision of the Court in the case of *Feather* v. *The Queen* (1); and, with the exception of one word which the Solicitor-General proposed to add, I did not find that he took any exception or made any objection to the words which I proposed to insert. I propose to read, my Lords, and I submit to your Lordships that it is the proper course that we should read, the grant of the letters patent as a grant by the

Ante 633

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

Crown to the patentee of a "license, full power, sole privilege and authority that he" the patentee, "his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as he" the patentee, "his executors, administrators, or assigns, shall at any time agree with, and no others." I propose there to insert these words, "excepting officers, agents, and servants of the Crown, acting on behalf of and for the use of the Crown" "from time to time, and at all times hereafter, for the term of years herein expressed, shall and lawfully may make, use, exercise, and vend the said invention within our *United Kingdom*, &c." My Lords, I say I did not understand the Solicitor-General to object to the words which I proposed to insert, except that he added to the words which I have proposed the word "agents," I having used simply the words "officers and servants of the Crown."

My Lords, the question then is, if that be the effect of the grant of the letters patent, if the grant is such that the sole privilege is communicated to the patentee and to those whom he may license, but that there is still engrafted upon that an exception which would authorize the Crown to use the invention, and would authorize an agent, an officer, or a servant of the Crown, acting on behalf of and for the use of the Crown, to use the invention, is it the case that the Respondents in the appeal before your Lordships fill the position of officers, agents, or servants of the Crown, acting on behalf of and for the use of the Crown? Now, my Lords, in order to answer that question you must turn to the contract itself. The Crown was desirous of being supplied with 13,875 rifles, and a tender was issued which appears to have been circulated among the different companies and manufacturers who might be likely to supply these arms, and, among the rest, one of these tenders was sent to the Respondents, who constitute the *London Small Arms Company.* The tender contains in the first place the terms and conditions of the contract. The first clause is: "The articles required are to be of the qualities and sorts described, and equal in all respects to the patterns or samples and specifications, which may be inspected on application, as herein directed; and to be delivered by the contractor at his own

H. L. (E.)
1876
DIXON
v.
LONDON
SMALL ARMS
COMPANY.

expense, in the time or times specified, into the charge of the officer at the station named, accompanied by an invoice in duplicate, and no article that is rejected under section 2 shall be considered as having been delivered under the contract." The second clause is, "Previous to the articles being received into store, they will be examined by the officer or officers appointed for that service, and if found inferior or defective in quality they will be rejected, and the contractor is to remove the same at his own expense within ten days after he is required so to do, without any allowance being made to him for such rejected articles." I pass over the clauses until I come to the 7th, which is in these words: "Should the articles, or any portion thereof, not be supplied within the period or periods stipulated for the delivery, a fine of 2½ per cent. on the value of the articles deficient will be levied upon the contractor, and which fine may be deducted from any sums due to the contractor under this or any other contract, or demanded of him to be paid within fourteen days to the Paymaster-General, to the credit of the War Office; and in addition thereto the Secretary of State for War shall be at liberty to purchase the supplies from other persons, and to charge the difference between the price paid for the same and the contract prices to the contractor, and which difference shall be deducted and paid in like manner as the fines hereinbefore mentioned, and farther, the Secretary of State for War shall be at liberty, if he think fit so to do, to terminate the contract at or after any one of the specified periods at which default shall have been made either wholly or to the extent of such default." Then, my Lords, there follow the details of the articles to be supplied, which are stated to be "13,875 rifles, *Martini-Henry*, without sword-bayonets or scabbards, at £3 10*s.* (say seventy shillings) each, less 7*s.* 6*d.* each for steel tube, and 2*s.* 2*d.* each for stock. Patterns and specifications to be seen at the Royal Small Arms Factory, *Enfield.* Materials for barrels and stocks will be issued from the Government stores. The viewing as required by specification during the process of manufacture will take place at *Old Ford, Bow, E.*"

To that, my Lords, must be added what is not printed in the case, but was produced by the parties before your Lordships as being referred to in the tender, namely, the specification of these rifles. It is headed, "Specification and course of view to govern the supply by contract of interchangeable *Martini-Henry* rifles without sword or common bayonet. The following articles will be issued from the Government stores to the contractors, viz., steel tubes for the barrels, stocks in the rough. In case of either of these articles being injured, during manufacture, by the contractor, they will be replaced from the Government stores, and charged to the contractor. The coil mainspring will be supplied by the Small Arms department, and inserted in the action when being viewed for assembling and pull-off by the 'viewer.' All the other articles comprising the arm will be provided by the contractor, and in accordance with the following list, which also shews the material they are to be made of." I pass over the list, and I pass over the "course of view including proof," which is applicable to the barrels, and does not concern the present question. At page 4 there is a provision for viewing the action of the breech, and then finally, at page 5, there is a clause headed "arm assembled." "The arm will be brought in for view assembled complete with all the parts finished."

Therefore, my Lords, in substance the result of the whole is this; what I may call the raw material for the barrel, the steel tube, is supplied by the Government at a certain price; the butt or stock of the rifle is supplied by the Government at a certain price; all the other component parts of the arm have to be provided or made (for the contract is consistent with either view) by the contractors. The whole component parts have to be inspected from time to time by the officers of the Government. They have the right from time to time to reject any part of the arm while in the course of manufacture which is not consistent with the contract and the specification; and when the whole is, to use the technical term, "assembled," when all the pieces of the arm are put together, then if it complies with the specification, and in that case only, it is to be taken over and accepted by the Government, and the property in it is to pass to the Government, and, on the other hand, the price is to be paid for the article to the contractors.

My Lords, the question then has to be asked:—During this process, what is the position of the person who is called the contractor? He is clearly not a servant of the Crown. That was not contended. There is no contract of service whatever between him and the Crown. He is not an officer of the Crown engaged in the service of the Crown. Is he, then, an agent of the Crown? My Lords, I cannot find any ground whatever for contending that the contractor is an agent of the Crown. He is a person who is a tradesman, and not the less a tradesman because he is engaged in works of a very large and extensive character; he is a tradesman manufacturing certain goods for the purpose of supplying them according to a certain standard which is laid before him as a condition on which the goods will be accepted. During the time of the manufacture the property, at all events, in that which concerns the present case, namely, the property in the lock, or the breech-action of the rifle, is not the property of the Crown. The materials are not the materials of the Crown. If the Respondents make the lock themselves the materials are provided by the Respondents, and the Respondents work upon those materials, not as the agents of the Crown, but as conducting their own work and their own manufacture for the purpose of supplying the complete arm.

My Lords, I can find here no delegation of authority—no mandate from a principal to an agent; I find here simply the ordinary case of a person who has undertaken to supply manufactured goods, who has not got the goods ready manufactured to be supplied, who has to make and produce the goods in order to execute the order which he has received. I find him engaged in that work on his own account up to the time when the article is completed and handed over to, and accepted by, the person who has given the order. I therefore arrive at the conclusion that there is not here on the part of the Respondents that which amounts in any way to the character or the *status* of an agent, a servant, or an officer of the Crown. If so, the Respondents are not within the exception which the case of *Feather* v. *The Queen* (1) decided to exist in letters patent; and, if they are not within that exception, it appears to me that the other question becomes quite unimportant; for if not within the exception, it would be impossible that the Crown could communicate to them a privilege which was only a privilege attaching upon the Crown itself, and upon those who might be the agents, servants, or officers of the Crown.

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

My Lords, that is the whole of this case. It appears to me, with great respect for the Court of Appeal, that the decision of the Court of Queen's Bench, a unanimous decision, and a decision pronounced by Judges of whom two at least took part in the decision of the case of *Feather* v. *The Queen* (1), was an entirely correct decision. Speaking with great respect of the very learned persons who composed the Court of Appeal, and who also were unanimous, I am bound to advise your Lordships that the decision of the Court of Queen's Bench ought to be restored, and that of the Court of Appeal reversed.

My Lords, I apprehend that your Lordships will think it right, if you reverse the decision, to reverse it in a way which will carry to the successful party the costs in the Court of Queen's Bench and the Court of Appeal.

LORD HATHERLEY:—

My Lords, I have arrived at the same conclusion upon a consideration of the few facts which are important, as it appears to me, for your Lordships' deliberation in this case.

In the first place I will direct my attention to that which I conceive to be settled in the case of *Feather* v. *The Queen* (1), as far as that case went. I take it to be there settled that, notwithstanding letters patent having been granted to a subject, giving him the sole and exclusive right of manufacturing and vending a patented article, and notwithstanding those letters patent being still current, it is competent to the Crown to manufacture those articles through the medium of its officers, its servants, or its special agents if you will, appointed for that purpose. The decision in that case went no farther than that. Then turning one's attention to the few facts, as I have said, which exist in this case, it appears to me that we have a contract entered into on the part of the Respondents with the Crown, which contract I will very briefly consider presently; and we have to ask ourselves whether anything can be found within that contract to induce your Lordships to say that the Respondents, by virtue of that contract, fill the position of being either servants or agents to the Crown in the manufacture of the article which they undertook to supply.

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

Now there are two very well-known modes of arriving at the possession of a manufactured article of which you desire to have the use—the two modes recognised both in private life, and in public engagements, and which are in themselves clear, distinct, and separate in every way; although, when you come to reason upon cases put hypothetically before you for consideration, you may find in some cases that the boundary line between that which is manufactured by what I may term home-manufacture, and that which is bought under a contract such as we have here, may be fine—I do not think in the present case such a difficulty exists. But, taking an illustration from the very same character of case as that before us, I can explain very readily what I meant to convey by the observations I have just made. The Crown possesses dockyards in which vessels are built—it possesses divers manufactories in its public arsenals which are put in use by the Crown by means of its servants and agents. There is, I think, at *Plymouth*, a large biscuit manufactory, through the medium of which all the buscuit for the Navy is or used to be (I do not know whether it is now or not) manufactured avowedly by the Crown; and in those numerous cases which occurred some few years ago upon *Bovill's* patent with regard to the grinding of corn, reference was made to the use of his apparatus in the Royal Biscuit Manufactory. I take it that the Crown through its servants and its agents would be at perfect liberty under *Feather* v. *The Queen* (1), acting in its own factory, to carry on that manufacture without paying any royalty, except as a manner of bounty on the part of the Crown, to the patentee of the machinery which was employed in such a work. So, again, whilst building their ships in their naval arsenals, the Crown and its officers would be entitled to make use of the very largely multiplied patent inventions which exist with reference to the construction of a ship, without paying, except as I have said by way of bounty, any premium to the patentee for the use of any invention or any article which has been patented.

But then one has to ask whether, in the documents which we find before us, there is anything at all approaching to this. Now I apprehend, my Lords, that when you speak of a home manufacture, and a manufacture through the medium of servants and agents of your own, you ordinarily mean, although in some cases some elements may be wanting, and in others, others—that there is a plant—that you have an establishment—that you either have in your own possession or have acquired by purchase the article upon which you are to operate in bringing your manufacture to perfection—and, having done all that, you proceed to manufacture as you think fit, at your own time and in your own manner, stopping the manufacture when you think fit so to do, and retaining the control over it in your own hands. I do not think that that would be interfered with because you might give out one or two portions of it to be manufactured by piece-work, if you think fit to do so. But how different is that from the contract which you enter into when you go out into the open market and purchase an article. For instance if, for some reason or other, the Crown should cease to manufacture its own biscuit, and should apply to the large contractors who contract for the supply of articles of this description—provision contractors and the like—and offer to them contracts to be tendered for and say: We give up our plant, we give up the persons who have been engaged in our service, the persons who have been employed in carrying on this work, we think it beneficial to the public that we should become purchasers, instead of manufacturers, of this article.

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

My Lords, it appears to me that that is the simple thing that has occurred here. I am stopped from considering all the nice distinctions which might be made in the case of a contract in such a form, or in such another form, and the like; and I ask myself, What is the contract we have here? Now the first observation I make upon it is this: there is a printed document which is issued, and which is, obviously, from its printed form, and from what you there find, intended to be a form for inviting tenders for every description of supply that the Government may think fit to require tenders for. The first document—that document which is dated "War Office"—is to invite tenders for rifles, and it has the word "rifles" introduced into it. It might have been for biscuits; it might have been for anchors, patented in a certain manner, or otherwise; but it happens to be for rifles. There is no reference in that document whatever to patents. This being, as I have observed, a printed document, it has no reference at all to patents or to dealing with patents in regard to the articles which were to be supplied under the contract. If there was any intention of handing over an authority on the part of the Crown, if the Crown conceived that it had such a right, which I, for one, am not satisfied could in any way be established—if there was any intention of handing over, with the contract, by others, to supply what the Crown did not think it convenient to manufacture for itself, the power and authority to the contractors of providing themselves with patented articles for that purpose without obtaining a license from the patentee, or without purchasing them from the patentee—I apprehend that if that idea had crossed anybody's mind in framing this invitation to tender, we should have found some reference to patents in it, whereas we find none; we find only a contract to deliver a certain article patented or unpatented

After that comes the tender, exactly in the same form; and then after that the specification. I do not intend to occupy your Lordships' time at any length upon this subject, especially after it has been so fully discussed, as it has been, by the noble and learned Lord on the woolsack, who has preceded me; but I can find nothing in any portion of the specification which leads me, at any rate, to the conclusion that the Crown intended that this supply should be different from any other supply which a person or a company may desire to have when he is going to do any work upon a large scale—anything which can make this, in fact, different from many cases that were suggested in the course of the argument. One of those cases, which was suggested at first by my noble and learned friend on the woolsack, was the case of a contract with a builder to build you a house. You might say,—I wish to have a house built, and I give you a certain specification upon the subject on which your contract is to be framed. I intend to have the different things which are of principal importance in the house provided for in a certain fashion. And, just as this contract which we have before us provides in the specification for a pattern gun, which, I assume, includes the breech-action, for which the Appellant has a patent by purchase from the patentee; so in the same way, I suppose, the specification for a house would indicate that the windows were to be of a certain pattern, with reference to the glass or the fixing of them, and that the cowls of the chimneys were to be of a certain patented form. How would that contract be construed by any Court whatsoever? It would be held that the contractor was bound to acquire those windows and those cowls, and to acquire them, like everything else that he acquired, of course lawfully and not unlawfully.

That, my Lords, is all that the contract amounts to here. Here, on the one hand, the officers of the Government say: We do not intend to do home-manufacture; we have home-manufactories, but we do not intend to use them for this purpose; we have home-manufactories for cannons, provisions, biscuits, and the like, but we do not intend to carry on these home manufactures at all; we intend to purchase these articles, and to obtain a tender of the prices at which they are to be supplied. We have furnished a pattern, which is to be followed, and that pattern, as it happens, involves a patent breech to the gun, which is to be furnished. The contractor says: I undertake to furnish you with all this; and he being a contractor who is furnishing for a given price, for a profit to himself, not, as it appears to me, in any sense in which the word can be used, as an agent for the Crown, but simply as engaging to sell to the Crown, to supply to the Crown, this article in this form; he is undertaking to do all that. Of course if a patented portion comes in his way in the pattern gun which has been furnished to him, that patented article he must provide in a lawful manner. I cannot understand in the least that he is placed in any position of difficulty whatever. Several possible positions of difficulty were suggested; but if he did make the complaint, and made it with any justice, that he could not obtain the articles of a patented character, I apprehend the answer of the Crown would be: We told you that you might look at the pattern—at the specification of the article you were to furnish—before you made your tender. You made your tender. We presume you considered all these things before-hand. If you have not done so, it is your fault; it is no fault at all of those who entered into the contract with you. Under these circumstances I cannot understand how this contract can be said to be anything else than a contract of those who have tendered, and who are acting as contractors for the sale of an article they have manufactured, just like any other articles they are in the habit of manufacturing; and I think that the privilege which would have attached to the Crown for its own manufacture cannot be considered to attach to a person who, on his own behalf, enters into this contract, and undertakes to supply the Crown with these articles.

For these simple reasons, my Lords, it appears to me that this case becomes, when it is thoroughly sifted, sufficiently plain in its result, although undoubtedly one ought to speak with some hesitation upon the subject when one sees the unanimity which prevailed in the Court from which the appeal is brought. But, on the other hand, one must set off against that the unanimity which existed in the Court whose original judgment was reversed on that occasion.

LORD PENZANCE :—

My Lords, I am very glad that this case should have received so full and so very elaborate an argument, not only on account of the importance of the case, and the principles involved in it; but because I think the result of that argument has been to shew that the real point upon which the case turns is narrowed to a very small one.

My Lords, I conceive that the real question in this case is simply this, whether under the circumstances the contract which was made between the Respondents and the Government was a contract of agency or a contract of sale; and I conceive that the argument on the part of the Respondents that it was a contract of agency, rests upon the general proposition that in all cases where an individual, bargaining, contracts to sell a completed article, which is to be manufactured according to the special directions of the purchaser, he is, while in the course of manufacturing that completed article, the agent of the purchaser. It seems to me that it is impossible for the Respondents' argument, as presented at the Bar of your Lordships' House, to be correct unless it goes that length. It must go the length of asserting that where an article required specially to be made is ordered of a tradesman, subject to a condition and bargain on the part of the orderer that he will accept the article when made, if satisfactory and if in accordance with his order, the tradesman while in the course of making the article is throughout acting as the agent of the purchaser.

Now, my Lords, I say it is necessary to go that length, because in the present case the basis of the whole argument is the case of *Feather* v. *The Queen* (1), in which it was decided that although a patent created a monopoly as against all the Queen's subjects in the patentee, yet it reserved to the Crown the use of the invention without regard to the patentee's rights. That is the basis of the argument, and in order to carry the argument forward it is necessary to make out that in this case the Crown has used the invention. We all know that the Crown is an abstraction, and that the Queen individually could not use the invention. Therefore, if there has been a use of the invention by the Crown it could only be by the Crown's agents; and so it is that the argument comes round to the point, whether upon a contract which no one will deny to be, upon the face of it, a contract of sale, there is a contract of agency during the carrying out of the work—a contract of agency which when completed must end in a sale of the property in the completed thing, and a passing over of it to the purchaser.

Now, I will not trouble your Lordships by reading again the contract which my noble and learned friend on the woolsack has read in detail; but it is obvious from the terms of it that it is a contract for the supply of certain articles to be delivered in certain quantities, at certain times. It is also obvious that the articles are not to be received unless they come up, in the opinion of the Crown officers who are to inspect them, to the sample and the specification according to which they were to be made. The contract itself contains of course a reference to the specification; and it has been argued that that specification in some respect alters the character of the contract. Now, in this specification I can find nothing but this—certainly the language used in the specification seems to contemplate that the arm as a completed article is to be manufactured at the premises of the Respondents, because in the tender which the Respondents made I find that under the heading of the place where the viewing is to take place during the process of manufacture, they put the address of "*Old Ford, Bow.*" Again, I find that the arms are to be taken over by the Royal Small Arms Factory superintendent, at the company's manufactory at *Old*

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

Ford. Then, again, in the specification I find the manufacture by the Respondents in so many terms spoken of thus: "A standard working pattern arm, with the standard jegs and gauges, will be kept at the inspection department for reference, and to enable the contractors to make similar gauges for guiding their manufacture according to the specification." Therefore, I think, it is a fair result of this specification, coupled with the words of the tender which was put out by the Government, that the Respondents were to manufacture the article as a complete article. But it is impossible, I think, to say upon the face of either the contract or the specification that they were bound to make every individual part of it. It is impossible to say that they would not have fulfilled their contract if in the course of manufacturing the entire arm they had introduced parts which had been made by other people or came from other sources.

That, my Lords, being the state of the contract, the question which occurs is, whether there is anything in that contract to turn it into a contract of agency. Now, my Lords, in asking that question several tests have occurred to my mind which might throw some light upon the subject. First, could the Respondents, if a foreign Government had wanted a thousand of these breech-actions, have sold a thousand of those breech-actions which were in the course of being made at their factory? And if they had sold them, and if nevertheless they had supplied the British Government with the requisite and agreed quantity of arms at the agreed times, would Her Majesty's Government have had any cause of action against them? If they were making them as the agents of Her Majesty's Government, as fast as every piece of work was put upon the material it would become the property of the Government, the Government would have an interest in it, and the Respondents would not, as it appears to me, be able to sell or part with it to anybody else. But if they were only under a bargain to deliver a certain number of articles at a certain time, then, although in the first instance they may have intended certain portions of the work to be applied to the fulfilment of that contract, there might be nothing, if they were not agents, to prevent their parting with them to other people.

Then, again, could the Crown, which is looked upon according to the argument as the employer, the authority whose agents the Respondents were,—could the Crown, while the work was going on, order the dismissal of a particular workman, or order any step to be taken which the officers of the Crown thought desirable? Could they give any special directions for doing the work in a special way, or was that entirely in the power of the Respondents? If the Respondents were their agents, doing their work under a contract of agency, it would seem to follow that the principal might withdraw any previous orders he had given, and order that the thing should be done in a different way. Of course when the question of remuneration came to be considered, that might impose upon the employer some farther pecuniary liability; but, so to speak, he would be master of the work, and would be entitled to give such orders as he pleased while the work was going on.

Another test occurs to me. Suppose a fire had taken place at the factory while this work was being done, and some of these articles had been either injured or utterly destroyed, at whose risk would that have been? My Lords, there can be but one answer. I speak only of the breech-action. I pass by those portions of the work which were provided by the Crown. With regard to the breech-action, those things upon which the Respondents had been doing work, with a view to complete this contract ultimately, by presenting a complete arm, there can be no doubt that any loss which happened by fire to those portions of the work would fall upon the Respondents themselves.

Then, again, as to the rate at which the work should proceed; provided they complied with the contract, by delivering the requisite quantity of arms at the given time, the Government would not have had the ordinary power which an employer has of either accelerating or retarding the rate at which the work was to proceed.

My Lords, all these may be trifling matters, but they are all incidents which appear to me to belong to a contract of agency, as distinguished from a contract of sale. I think the true distinction in this case is between an authority or mandate to do a thing for a money reward, in the doing of which, whether the individual is a servant or only a contractor, he is all along acting as an agent, and a contract for the supply and acceptance, if approved, when completed, of an article to be made by the contractor, in the making of which the contractor, though working under inspection, is *all along acting on his own behalf*, and at his own risk. I conceive that this latter description is a description which properly applies to the contract in this case, and consequently that the Respondents never were the agents of the Crown, and therefore are unable to set up the immunity which the Crown enjoys

My Lords, I wish to say one word upon another branch of the subject. Supposing it is said that the Crown has power to authorize an agent to do work for it which would otherwise be an infringement of a patent, must there or must there not be some authority beyond a mere authority to make the patented article? Must there or must there not be some authority to make it without a license from the patentee? Now, I confess I incline to the opinion that Sir *William Harcourt's* argument upon that subject is well founded. This patent reserves, as patents generally do, always I believe now, a power in the Crown to demand of the patentee, the making of any quantity of the patented article the Crown may require, at reasonable prices. No doubt that means a price which will remunerate him as a patentee. On the other hand, the case of *Feather* v. *The Queen* (1), which we assume for this purpose to be good law, declares that the Crown may do it without giving any reward whatever. But I cannot help thinking that, whether the Crown should or should not, in any particular case, desire to take advantage of that immunity, must be a question upon which the Crown is entitled to exercise its discretion, and therefore that any bare contract (supposing that this were one of that character, which I have already pointed out I do not think it is) with an agent to do the work, if the Crown says nothing to the effect that he is to do it without reference to a patentee's rights, will not be sufficient to shew that the Crown was exercising such an election, and consequently the agent, without such express authority, would have no right to infringe the patent. My Lords, I say that with some hesitation, because my noble and learned friend on the woolsack appeared to think otherwise. It

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

is not perhaps material in this case, because all your Lordships are I believe of opinion that on the main point the judgment of the Court below must be reversed, and the judgment of the Court of Queen's Bench restored.

LORD O'HAGAN:—

My Lords, this case has been narrowed so much and discussed so thoroughly that, but for its general importance and the singular conflict of judicial opinion upon it, I should have declined to add anything to the observations of my noble and learned friends. I shall state, in the briefest terms, the grounds of my agreement with them.

I am strongly of opinion, with the learned Judges whose decision in *Feather* v. *The Queen* (1) is the subject of our present consideration, that it is not desirable to extend the principle established by that case (2). I do not think that it should be extended for any of the reasons which have been suggested to your Lordships: and it seems to me that the ruling of the Court of Appeal, if adopted by this House, would involve such an extension, with very serious consequences.

In *Feather* v. *The Queen* (1) the contention was between the Crown and the patentee. Here it is between two subjects, one of whom complains of the other as having infringed on his undoubted right; and unless in the doing of the thing complained of the Crown was really the actor, and the Respondent its mere servant or agent, obeying its express command for its sole use and benefit, the invasion of the patent was unwarranted, and the Appellant must prevail.

But for the opinions which have been expressed the other way, I should hold it clear that the Respondents were not the servants or the agents of the Crown, so as to obtain, for an admitted infringement, the immunity which the law, as it stands, must be taken to afford to the Crown. They were not servants or agents for that purpose, acting under a master's control, dealing with a master's property, and attending merely to a master's interests. They were contractors making a specific bargain for their own profit, and securing that profit by operating on property of their own. They entered freely into a contract "to provide and deliver" the articles specified in it. During the preparation of those articles, the property with which they dealt continued to be their own, save, perhaps, so far as the materials to be manufactured were supplied to them. Until the contract was complete, they used that property as they pleased, on their responsibility and at their own risk; and it was in the power of the Crown to reject their work at any time before the completion and delivery of it. I think it impossible to say that, in such circumstances, the incidents of the relation of master and servant, or superior and agent, attached as between the contractors and the Crown.

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(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

(2) See Law Rep. 10 Q. B. at pp. 136–138.

It has been urged that the contract was to "make" or "manufacture" the rifles. I find nothing in its terms, or in the specification or the schedules, to necessitate any such construction of it. As I have said, the contractors' undertaking is "to provide and deliver," and the specification begins by the consistent use of the word "supply." I conceive that the exigency of that undertaking would have been answered if, manufacturing the materials supplied by the Crown, they had supplemented them and finished the arms by other materials, including the patented article, however and from whomsoever they might have been procured. The contract was not of service but of sale, for the contractors' own benefit, of certain commodities, fulfilling certain conditions, and to be paid for on certain terms; and if those conditions were fulfilled, whether by their own workmanship or articles provided at their instance, I apprehend the Crown could not have rejected the commodities; as, on the other hand, its rights of rejection on non-fulfilment until the moment of delivery remained intact, a state of things difficult to be reconciled with the theory of agency or service.

The exact position of the parties, in this regard, seems to me to have been somewhat misconceived by the learned Judges of the Court of Appeal when they described the Crown as "supplying the materials and simply ordering the manufacture of an unmanufactured article." If this had been so; if all the materials had been supplied by the Crown to its own hired servants, acting in its own premises, exercising no discretion, and having no property, but merely carrying its orders into effect, the cases cited as to the liabilities of principals might have application, and the Crown might have been regarded as itself the manufacturer and protected by the implied exception of the patent. But the facts appear to me to be otherwise, as I have indicated already, and I agree with Mr. Justice *Archibald* (1) that "the contract might have been performed by supplying articles manufactured long before the date of the contract. The rifles were to be furnished by subcontractors, and it was not a case in which the Crown was manufacturing itself."

Then it was competent for the contractor to have fulfilled his agreement to the letter by paying for the license of the patentee; and the contract does not, on any construction of it, expressly or implicitly declare that the Crown designed or directed the dispensing with that license. The order "to provide and deliver" involved neither requirement nor approval of illegality, and cannot be assumed to have been issued with the desire that the contractor should act without the permission of the patentee, and therefore, so far as he was concerned, in fraud of individual right and in contravention of the law. Surely, the contrary assumption, if any, should be made. If the work could be done in one of two ways—legally or otherwise—ought we to suppose that the legal mode was not contemplated, in the absence of clear words forbidding it? But there are no such words. There is not in this case any protective or fortifying order of the Crown, if any order could have been so, by which one subject can shield himself from the consequences of his invasion of another's right; and, on this ground, Sir *W. Harcourt's* argument appears to me unanswered and sufficient.

As to the reasoning based on considerations of policy, I shall only say that it cuts both ways. The Crown appears to me to have guarded the public interests, by the frame of the patent, with abundant care. It secures the service of the patentee on terms dictated by itself, and with penal consequences of a grave character if that service be not fitly rendered; and it has power, if necessary, to increase the stringency of the conditions of its grants. But, on the other hand, policy and justice seem equally to demand

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(1) Law Rep. 10 Q. B. 138.

H. L. (E.)
1876
DIXON
v.
LONDON
SMALL ARMS
COMPANY.

that we should not be persuaded lightly to adopt a view derogating largely from the rights which a patentee has purchased by his genius, his labour, and, it may be, his fortune, and which are vested in him for the interests of society more than for his own. At the very least, a royal order, relied upon as authorizing injurious interference with profits which are solemnly secured to him by royal grant, should be clear and unequivocal if it is to be effective: and no such order, as I have said, has been proved in this case. The argument from policy does not, therefore, help the Respondents.

With very sincere deference for the Court of Appeal, and such distrust of my own judgment as that deference suggests, I am obliged to concur in the reversal proposed to your Lordships.

LORD SELBORNE:—

My Lords, I agree with the opinions which have already been expressed.

I consider the case of *Feather* v. *The Queen* (1) to have determined that letters patent for inventions operate to grant an exclusive privilege to the patentee against all the subjects of the Crown; and that the Crown is not bound by them, not (strictly speaking) because it is impliedly excepted, but because the privilege granted is a privilege against the subjects only, and not a privilege against the Crown. But, for the purpose of testing, in this or in any other case, the consequences of that decision, I see no reason to object to the manner in which it was put by my noble and learned friend on the woolsack, viz., as if the Sovereign, and the officers, agents, and servants of the Sovereign, had been expressly excepted from the operation of the grant.

I agree with the Court of Queen's Bench that this decision is not to be extended by any reasoning from the convenience of the Crown or of the public service, or from any idea that it practically comes to the same thing, whether the Crown manufactures itself or gives orders to other manufacturers. It cannot, on any such grounds, be extended so as to make the grant less operative than, according to its proper construction, it purports to be, against the

(1) 6 B. & S. 257; 35 L. J. (Q.B.) 200.

subjects of the Crown. It would be inconsistent with the grant to hold that the exemption of the Crown from this privilege can be imparted to a subject, whether it might or might not be convenient to the public service, in any particular case, that this should be done.

The case, therefore, in my opinion, depends upon the question whether the relation of master and servant, or of principal and agent, existed between the Crown and these Respondents, during the process of the manufacture of the breech-action in question, and for the purposes of that manufacture; and this question must, in my opinion, be decided by a strict and accurate application of legal principles to this particular contract, exactly in the same manner as if any private person, and not a public department, had contracted with the Respondents, in the terms of the documents before us, for the supply of these arms.

I cannot doubt as to the answer to be given to the question when that test is applied. There was clearly no contract of hiring and service, and I am equally clear that any private persons who entered into such a contract, would not have been liable for the acts of the Defendants during the process of manufacture, as a principal is liable for the acts of his agent. It is not like the case of a railway contractor who executes works which the company itself is bound by law to execute, and which only can be executed by the directors, or by some person acting by their authority, and entitled on their behalf to exercise the powers vested in them by the Legislature. Nor is it like the case of a direct order to a contractor to do an unlawful act, to the injury of another person. Here there is no order to infringe any patent; and it cannot be inferred that this would have been intended or authorized by a private person entering into this contract, the use of patented articles or patented processes being, in the ordinary course of business, a thing which may be lawfully obtained in the proper market, just as any necessary materials might be, which the manufacturer, taking the contract, might not himself have in stock.

Judgment of Court of Appeal reversed, and judgment of the Court of Queen's Bench restored.

H. L. (E.)
1876
DIXON
v.
LONDON
SMALL ARMS
COMPANY.

Sir *William Harcourt:*—My Lords, I do not know upon the question of costs what form of order should be made in your Lordships' House. The Court below gave costs against us, both the costs in the Appellate Court and in the Court of Queen's Bench, and I should imagine that the natural result of your Lordships' judgment would be that we should have the costs of this appeal and all the costs below.

LORD HATHERLEY:—As regards the costs in the Court of Queen's Bench the judgment of that Court is restored by our order, and the judgment of the Court of Appeal below is reversed; therefore, all that was ordered by the Court of Appeal is gone. No costs are given of the appeal to this House.

Sir *William Harcourt:*—Do I understand your Lordships to say that, according to a rule in this House, no costs are given of the appeal to this House?

LORD HATHERLEY:—That is the decision of the House.

Lords' Journals, 11th July, 1876.

Solicitors for the Appellant: *Stibbard & Cronshey.*
Solicitor for the Respondent: *J. Clulow.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
July 3, 4, 6, 27.

WILLIAM LYON . . . . Appellant;

AND

THE WARDENS, &c., OF THE FISHMONGERS' COMPANY AND THE CONSERVATORS OF THE RIVER THAMES } Respondents.

Thames Conservancy Act (20 & 21 *Vict. c. cxlvii.*)—*Riparian Proprietor.*

2 App Cas 263
5 Ch D. 716
14 Ch D. 542, 550
551-4
App Cas 84-7
98, 99.
6 QBD 273-5
7 App Cas 269
299

By the *Thames Conservancy Act* (20 & 21 Vict. c. cxlvii.), s. liii. the Conservators appointed under that Act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner.

The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. It comes therefore within the operation of the saving clause (sect. clxxix.) of the *Thames Conservancy Act.*

The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream.

The power granted to the Conservators under the 53rd section of the 20 & 21 Vict. c. cxlvii., is qualified and restricted by the provisions of the 179th section.

THIS was an appeal against a decision of the Lords Justices which had (except as to one point, upon costs,) reversed a previous decision of Vice-Chancellor *Malins.*

The Appellant was the owner of certain freehold land and buildings on the north bank of the *Thames*, known as *Lyon's Wharf*, the whole of the southern side of which fronted the river. At the western extremity of this frontage there was an inlet which extended about forty feet to the northward, and formed the western boundary of the Appellant's property. At the bottom of this inlet stood a wharf belonging to the *Fishmongers' Company*, commonly known as *Winckworth's Wharf.* The water of this inlet, bounding the Appellant's property to the west, and running up to the main

H. L. (E.)
1876
Lyon
v.
Fishmongers' Company.

river on the south, was called *Winckworth's Hole.* This inlet extended westward in front of the property belonging to the *Fishmongers' Company,* to a place called *Broken Wharf,* and thus the Appellant's property enjoyed the advantage of a double river frontage; to the south, on the main line of the river, to the west, on *Winckworth's Hole,* at the side. It was alleged that for an indefinite period of time both these means of communicating with the river had been enjoyed by the occupiers of *Lyon's Wharf.* On the west side there had been steps down to the water from a door, and there had been windows above the door, and there were piles in a line with the south front, behind which barges, conveying goods to the western side of the Appellant's warehouse, could be conveniently and safely moored. All these advantages had been in constant use by the Appellant's tenants.

In the year 1857, an Act called the *Thames Conservancy Act* was passed, by which a body called the *Conservators of the Thames* was constituted. The liii. section of that Act was in these terms: "It shall be lawful for the Conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river *Thames,* a license to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall, or other work, immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this Act directed, and under and subject to such other conditions and restrictions as the Conservators shall think fit to impose." The Act also contained a section (clxxix.) for protecting private rights (1).

The *Fishmongers' Company* obtained in 1872, from the Conservators, upon a payment of £250, a license or permission to make an embankment in front of their wharf (*Winckworth's Wharf*) up to the main line of the river, which would have the effect of entirely displacing the water from *Winckworth's Hole*, and so putting an end to the use which had always been made of it by the occupants of the Appellant's premises. On the embankment thus created, the *Fishmongers' Company* proposed to erect warehouses.

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(1) Sect. clxxix.: "None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge, any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, including the banks thereof, or of any aits or islands in the river, are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect, as if this Act had never been made."

Post 671

The Appellant, to prevent this from being done, filed his bill in Chancery against the Conservators and the *Fishmongers' Company*, praying that the Fishmongers might be restrained by injunction from constructing these works, or doing anything whereby the Appellant's right of access to the river on the west side of *Lyon's Wharf*, or the privilege theretofore enjoyed by him of laying and mooring craft, and loading and unloading goods, on the west side of *Lyon's Wharf*, directly from the river, might be defeated or prejudiced, and also from creating any obstructions so as to interfere with his right of access to the river as aforesaid. And also that the Conservators might be restrained from selling any part of the shore, or granting any license or authority to the *Fishmongers' Company* for the purposes aforesaid.

An interim injunction was granted—and the *Fishmongers' Company* put in an answer denying the right of the Appellant to the use and enjoyment of free access to the river as alleged, and claiming for the company the exclusive right of user of the water in *Winckworth's Hole*—and the answer also alleged the license of the Conservators for what was proposed to be done.

The Conservators by their answer claimed the right to grant the license under the provisions of the *Conservancy Act.*

Evidence was taken on both sides. The motion for a decree came on before Vice-Chancellor *Malins*, in April, 1875, when the injunction prayed for was granted (1), the two sets of Defendants being ordered, respectively, to pay the costs of the evidence filed on their own behalf.

The *Fishmongers' Company* appealed to the Lords Justices against this decree, which, on the 30th of July, 1875, was ordered to be reversed, and the bill, as against the *Fishmongers' Company*, to be dismissed with costs, except the costs occasioned by the claim of the *Fishmongers' Company* to the exclusive use of *Winckworth's Hole* (2).

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(1) Law Rep. 10 Ch. App. 681, n.

(2) Law Rep. 10 Ch. App. 679.

Mr. *Cotton*, Q.C., and Mr. *R. E. Webster*, for the Appellant:—

Independently of any question on the construction of the *Thames Conservancy Act*, the decision of the Lords Justices cannot be supported on principle. It could not be disputed that the Appellant was a riparian owner, yet the Lords Justices denied him, as a riparian owner on a tidal river, any rights with respect to the river which were not enjoyed by every individual who used the river for the purpose of navigation (1). Such a holding was in direct negation to the law as laid down by this House in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2).

A riparian owner has not only the right to the use of the water of a tidal river in the same way, and to the same extent, as any of the other subjects of the realm, but he has also special rights or easements connected with his land on the banks of the river. If those private rights were rendered less valuable, the party prejudiced thereby had a right to compensation, although the work complained of might be done under the authority of an Act of Parliament: *The Metropolitan Board of Works* v. *McCarthy* (3). That principle was acted upon in *Miner* v. *Gilmour* (4), and still more strongly in *Lord* v. *The Commissioners of Sydney* (5). In *The Attorney-General* v. *The Conservators of the Thames* (6), which was a proceeding on this Act itself, the Court distinguished between the rights possessed by a riparian owner and one who used the river solely for the purposes of navigation, and held the former to have a clear and established existence, and that the right of access to the land of the owner was a private right which came within the saving in the 179th section of the Act, and only rejected the claim of the owner in that case, upon the ground that what was proposed to be done was not an interference with the private right of access, but only with the public right of navigation which the owner enjoyed in common with all the rest of the subjects. It had long ago been decided in *Rose* v. *Groves* (7) that a declaration disclosing an act of damage to a private owner on the banks of the *Thames*, by obstructing the access from the river to his house, shewed a good cause for a claim for compensation. In the *Eastern Counties Railway Company* v. *Dorling* (1) a private right in the owner of land upon the banks of a navigable river was also recognised, and an injury affecting it was held to be the subject of compensation. And in *Kearns* v. *The Cordwainers Company* (2) though it was there held that the Conservators under this Act of 1857 might license the erection of a landing platform, which was for the public benefit, and which was thought not to be really injurious to the Plaintiff, the Court expressly declined to say whether the Conservators had power to license such erection so as to interfere with the vested rights of individuals owning land along the shore. *Marshall* v. *The Ulleswater Steam Company* (3) in like manner recognised the private rights of an owner of land on the bank of a navigable lake, in addition to those which he enjoyed, in common with the rest of the public, to navigate the lake, and the only question there really related to a conflict between the private rights of two separate sets of persons.

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(1) Law Rep. 10 Ch. Ap. 689.

(2) Law Rep. 5 H. L. 418.

(3) Law Rep. 7 H. L. 243.

(4) 12 Moo. P. C. 131.

(5) Ibid. 473.

(6) 1 H. & M. 1. 8 Jur N S. 1203

(7) 5 Man. & G. 613.

The *Thames Conservancy Act* did not justify what had been done here. It never was the intention of the Legislature to invade and destroy private rights. The object of the Act was to improve the condition of the river and increase the facilities for its easy navigation. That certainly would not be effected by forcing persons who had hitherto enjoyed the use of creeks and inlets for mooring their barges, to moor them in the full course of the river. So far from any intention of this kind being entertained by the Legislature, the 179th section of the Act was expressly directed to prevent existing rights from being invaded.

The Solicitor-General (Sir *H. Giffard*), and Mr. *Glasse*, Q.C., (Mr. *Chitty*, Q.C., and Mr. *Dundas Gardiner* were with them), for the Respondents:—

The question, what is the public interest in this matter, has not been properly considered, yet that forms the justification for the grant of this license. The river banks had required to be improved, and this Act was passed to facilitate that improvement. The

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(1) 5 C. B. (N.S.) 821; 28 L. J. (C.P.) 202. 5 Jur NS. 869

(2) 6 C. B. (N.S.) 388; 28 L. J. (C.P.) 285. 5 Jur NS. 1216

(3) Law Rep. 7 Q. B. 166.

Crown had consented, for this public purpose, to vest its own rights in the Conservators appointed under the Act, and the Mayor and citizens of *London* had done the same. Sects. 50 and 52 expressed this in the clearest manner. When this was done for a great public purpose it was not to be supposed that a small claim of private convenience was intended to be preserved so as to prevent a public improvement. The 179th section had no such purpose in view, and was, therefore, inapplicable to the present case. It was the imperfect condition of the river which had led to the use of *Winckworth's Hole* in a way now claimed by the Appellant as a matter of right. The object of the 53rd section was to enable the Conservators of the river to improve it by grants of licenses to individual owners of frontages along it, to form piers, jetties, or "embankments," that word being expressly used in the statute, and the security for the rights of individuals was sufficiently provided for by the necessity of appealing to the Conservators for a license to do what was required; and it must be assumed that the discretion thus vested in the Conservators would not be abused. The Court proceeded upon that principle in *Kearns* v. *The Cordwainers' Company* (1), and even more strongly in *The Attorney-General* v. *The Conservators of the Thames* (2), declaring that it would not assume that a duty imposed on the Conservators would be neglected, and that it could not interfere on a mere question of inconvenience. And with respect to the 179th section, though the Court held that the access to a wharf, which was claimed in that case, was a private right within the saving, yet that a pier which rendered the approach to the wharf less convenient, without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation, enjoyed by the wharf owner in common with the rest of the public, and that such right was not among those comprised in the statutory saving. That decision really disposed of the present case.

The right now contended for is not that of a riparian proprietor. That riparian right, so far as the Appellant is concerned, is that of access from the south front of his wharf to the river, and that access is not, and never has been proposed to be, interfered with.

(1) 6 C. B. (N.S.) 388; 28 L. J. (C.P.) 285. 5 Jur. N.S. 1276.

(2) 1 H. & M. 1. 8 Jur. N.S. 1203.

The Appellant has still perfectly free access to the river, but he claims, without reference to anything but his own convenience, to have the power of mooring his barges by the side of his warehouse, to have, in fact, a double frontage to the river. If that occasions an inconvenience to the common use of the river by the public, that is one of the very matters which the statute designed to remedy.

The 179th section was intended to protect proprietary rights long established, and incapable of being interfered with without serious injury to individuals. That was not the case here. If the south frontage had been interfered with there would have been an injury, and the Appellant would have had a ground of complaint. That had not been done, and the interference with the use of the water on the west side was no substantial injury of which he could complain. The cases relating to the *Thames Embankment Act*, *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (1) and *The Metropolitan Board of Works* v. *McCarthy* (2) do not apply to the present. The statutes to which they related were worded differently, and contained distinct provisions by which compensation was given in certain cases, and the only question that could be raised was, whether the claims from time to time put forward came within those provisions. And there the right which was to found a claim for compensation was required to be clearly existing private right. There was no such private right here. The Appellant could do all that he required by using the proper front of his warehouse. He had a right to access to that front, but he had no other private right, and that one was not affected. The right of free navigation was one he enjoyed in common with the rest of the world, and which could not form the ground for a private action, and that right had in truth never been interfered with. He had no special right of access by the side of his warehouse. [LORD SELBORNE:—All the authorities describe the right of a riparian owner in general terms, and do not draw the sort of distinction now suggested.] But there must be some distinction—there may be special rights, and there may be others which are only enjoyed in common with the rest of the subjects. The case of *Marshall* v. *The Ulleswater Steam Com-*

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(1) Law Rep. 5 H. L. 418.

(2) Law Rep. 7 H. L. 243.

pany (1) was one of that sort where all the rights contended for on either side depended on special circumstances, and on a consideration as to the balance of them the decision depended. That case in no way affected rights and powers conferred upon public commissioners for public purposes.

In this case the only injury of which the Appellant can possibly complain is one which he suffers, if at all, in common with the rest of the public; and for that his remedy is not by action for damages, or by private injunction, but by indictment: *Rex* v. *The Directors of the Bristol Dock Company* (2), a rule which had been acted on some years before in *Rex* v. *Russell* (3). The mere diminution of business' convenience was held in *Rex* v. *The London Dock Company* (4) to give no right to a claim for compensation even as against a company authorized by Act of Parliament, and the same principle was acted on in *Ricket* v. *The Metropolitan Railway Company* (5).

The power of the Conservators here is large; it was conferred for public purposes, and it must be liberally construed. *Galloway* v. *The Mayor of London* (6), *The Attorney-General* v. *The Corporation of Cambridge* (7), and *Kearns* v. *The Cordwainers' Company* (8), shewed that where a public purpose was in view, it must be intended that the public officers appointed under an Act of this sort would rightly exercise the power to do that which was necessary for the purpose of such Act, though it might interfere with the convenience of a private individual.

In all the cases relied on for the Appellant there was a clear legal right indisputably possessed by the Plaintiff, and which had been affected, if not destroyed, by the act complained of. If the Appellant had any legal private right distinct from the rights of all the other subjects it lay on him to prove it: *Anonymous* (9). Here there was nothing of the sort. The legal right of the Appellant was a right to the use of his river frontage—that he would enjoy now as he had enjoyed it before—in no way whatever was

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(1) Law Rep. 7 Q. B. 166.
(2) 12 East, 428.
(3) 6 East, 427.
(4) 5 Ad. & E. 163.
(5) Law Rep. 2 H. L. 175.
(6) Law Rep. 1 H. L. 34. 12 Jur NS. 747.
(7) Law Rep. 6 H. L. 303.
(8) 6 C. B. (N.S.) 388; 28 L. J. (C.P.) 285. 5 Jur NS 1216
(9) 1 Mod. 105.

H. L. (E.)
1876

LYON
v.
FISHMONGERS' COMPANY.

it proposed to be interfered with. He had not therefore any pretence to claim protection. On the other hand, he really sought to restrain the Conservators from authorizing what would be a public improvement, and denied to the *Fishmongers' Company* the full benefit to which that company was entitled from the frontage on the river, which really belonged to it.

Mr. *Cotton* replied.

THE LORD CHANCELLOR (Lord *Cairns*), after fully stating the facts of the case, the letters between the Respondents and the Conservators on asking for the license to embank, and the sections of the statute particularly in question, said:—

My Lords, it is to be observed that the power granted by the 53rd section to the Conservators is not simply a power to be exercised by them with any view to the improvement of the navigation of the *Thames.* It is of course a power which, like every other power given them by the Act, they are to exercise so as to preserve the navigation from injury; but subject to this, it is a power of granting to individuals, upon a money payment, the privilege of doing what they otherwise could not do in a navigable river, of pushing out an embankment or work in front of their land into the body of the river.

It is also to be observed that the possession by the Appellant of a west frontage to his wharf, and of the power of loading and unloading there as well as on the south, was to him a property of very great value. It was admitted at the Bar on the part of the Respondents, that the statements in the letters which I have read to the effect that the owner of *Lyon's Wharf* had not the same right of access to, and user of, the river on the west frontage which he had on the south could not be supported; and it was admitted, and indeed could not be disputed, that if, independently of the Act, this south frontage access, between his wharf and the river, had been cut off or interfered with, he might have maintained an action for damages; and that in any public work executed under the powers of the *Lands Clauses Consolidation Act* the destruction or interruption of this access would be an "injuriously affecting" of the Appellant's land within the meaning of

H. L. (E.)
1876
LYON
v.
FISHMONGERS' COMPANY.

that Act. The right to compensation in such a case under the terms of the *Lands Clauses Consolidation Act* was well established in this House in the cases of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (1) and of *The Metropolitan Board of Works* v. *McCarthy* (2).

Now, it is farther to be observed that no compensation whatever is provided by the *Conservancy Act*, for any injury done to the adjacent owners of lands on the banks of the river, by the execution of a license granted under the 53rd section. Admitting, therefore, as may well be done, that a license under the 53rd section, would be a perfect justification for an embankment made by a riparian owner in front of his own land, so far as it merely affected the public right of navigation, it would appear to be, *à priori*, in the very highest degree improbable that an Act of Parliament could intend, through the operation of that section, to authorize the Conservators to permit one riparian owner to affect injuriously the land of another riparian owner, in consideration of a payment to be made, not to the person injured, but to the Conservators themselves.

The Appellant contends that the Act has no such operation, and that any such operation is clearly prevented by the 179th section. That section is in these words:—[His Lordship read it, see *ante*, p. 663.]

The Lords Justices held that it must be taken to be established, and it was not disputed at your Lordships' Bar, that the Appellant had in respect of the west side of *Lyon's Wharf*, at the time when the *Conservancy Act* passed, the ordinary rights of the owner of a wharf on the banks of a navigable river. The question is, what are those rights, and are they preserved intact by the 179th section?

Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quâ* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf,

(1) Law Rep. 5 H. L. 418.

(2) Law Rep. 7 H. L. 243.

it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. It is, as was decided by this House in the cases to which I have referred, a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an "injurious affecting" of the land, that is to say, the occasioning to the land of an *injuria*, or an infringement of right. The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented. It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read.

The title of the Appellant, however, appears to me to stand still higher than I have thus put it. Lord Justice *Mellish* takes notice that it was contended on behalf of the wharfinger that the owner of premises abutting on a navigable river where the tide flows and reflows, has rights belonging to him as a riparian proprietor wholly distinct from the public right of navigation, and he goes to observe that the Lords Justices had been unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide (1).

With much deference for the Lords Justices, I should have thought that some authority should be produced to shew that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not: and not between tidal and non-tidal rivers; for, as Lord *Hale* observes (1). the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and reflow or not; and he remarks that the *Wey*, the *Severn*, and the *Thames*, "and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be the private propriety, as in what parts they are of the King's propriety, are publik rivers *juris publici*." A riparian owner on a navigable river has, of course, superadded to his riparian rights, the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation.

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(1) Law Rep. 10 Ch. Ap. at p. 689.

The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord *Hale* observes, be private property. But putting this aside, I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream. The late Lord *Wensleydale* observed, in this House, in the case of *Chasemore* v. *Richards* (2), "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour."

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(1) De Jur Mar, part i. c. 3.

(2) 7 H. L. C. 382. 5 Jur N.S. 677

My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation.

It cannot, as it seems to me, be open to doubt, that if the Appellant at the time of the passing of the *Conservancy Act* had the ordinary rights of a riparian owner in the water of the river, that right was maintained by the saving clause; and being infringed, as it clearly was infringed, by the embankment of the *Fishmongers' Company*, he ought to be protected by the injunction of the Court.

The authorities which were referred to during the argument appear to me, with one exception, to be in favour of the Appellant. I have already referred to the two cases in your Lordships' House, *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (1), and *The Metropolitan Board of Works* v. *McCarthy* (2).

The case of *Rose* v. *Groves* (3) was a case where a riparian owner, having a public-house on the *Thames* at *Bermondsey*, complained that his access to the river was obstructed by timbers and spars placed in the river by the Defendants, which drifted at high water up to and along the Plaintiff's land. Speaking of the declaration in the case, Lord Justice *Tindal* says (4): "A private right is set up on the part of the Plaintiff; and to that he complains an injury has been done. The declaration states that the

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(1) Law Rep. 5 H. L. 418.
(2) Law Rep. 7 H. L. 243.
(3) 5 Man. & G. 613.
(4) Ibid. at p. 620.

H. L. (E.)
1876
LYON
v.
FISHMONGERS'
COMPANY.

Plaintiff carried on the business of an innkeeper in a house which abutted upon a certain navigable river, and was and of right ought to have been accessible from the river to persons navigating thereon in boats and other craft." And farther on he says, "It appears to me that the Plaintiff is not complaining of any public injury. But even if he were, I think after the cases that have been cited, that he discloses a sufficient cause of action."

64 BD

The Lord Justice *Mellish* states (1) that the Lord Justices thought they could not decide in favour of the Appellant consistently with the case of *The Attorney-General* v. *The Conservators of the Thames* (2), and that they were not prepared to overrule that decision. As I understand that decision, it is one favourable, and not adverse, to the Appellant's argument. The question there, no doubt, turned upon an obstruction and upon the effect of the saving clause in the *Conservancy Act*. But my noble and learned friend Lord *Hatherley*, then Vice-Chancellor, held in that particular case that the obstruction complained of by the wharfinger was not a direct interference with the access to his wharf, but was, if an obstruction, an obstruction to the general navigation of the river. But speaking of a direct interference with the access to a wharf, the Vice-Chancellor expressed himself as follows: "Now I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and re-passing along the highway on the river." The existence of such a private right of access was recognised in *Rose* v. *Groves* (3). As I understand the judgment in that case, it went not upon the ground of public nuisance, accompanied by particular damage to the Plaintiff, but upon the principle that a private right of the Plaintiff had been interfered with. The Plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the Defendant had placed in the river; and it would be the height of absurdity to say, that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the

14 Ch D 55

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(1) Law Rep. 10 Ch. Ap. at p. 693.
(2) 1 H. & M. 1. 8 Jur. N.S. 1203.
(3) 5 Man. & G. 613.

H. L. (E.)
1876
LYON
v.
FISHMONGERS' COMPANY.

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public highway. This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. In *Rose* v. *Groves* (1) Chief Justice *Tindal* put the case distinctly upon the footing of an infringement of a private right. He says: "A private right is set up on the part of the Plaintiff, and to that he complains that an injury has been done;" and then, after stating the facts, adds: "It appears to me, therefore, that the Plaintiff is not complaining of any public injury." Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right."

The case which appears at first sight to be unfavourable to the argument of the Appellant is that of *Kearns* v. *The Cordwainers Company* (2). In that case, however, the only question was one between a lessee and his lessor as to the propriety of an award which directed the lessor to apply for a license to embank under the *Conservancy Act.* It was contended by the lessee that that license if obtained would not exclude the rights of adjacent owners; to which it was replied in defence of the award that the license under the Act would be effectual, because the adjacent owners would not be within the saving clause. But there was no adjacent owner before the Court, and the Court proceeded upon the supposition of what might be said for or against those who were not there to argue their own case. I cannot, therefore, look on the expressions of the learned Judges in that case as entitled to the same weight as if they had been made after an actual issue of right had arisen.

Lord Justice *Mellish,* indeed, refers to two other cases, *Marshall* v. *The Ulleswater Company* (3) and *The Eastern Counties Railway*

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(1) 5 Man. & G. 613.
(2) 6 C. B. (N.S.) 388. 5 Jur NS 12
(3) Law Rep. 7 Q. B. 166.

Company v. *Dorling* (1), not for the purpose of shewing that there is no such private right as alleged by the Appellant, "but as proving" (2), to use the Lord Justice's own words, "that the wharfinger is amply protected in his right of access to his wharf by his interest as one of the public in the right of public navigation, and that there is no necessity to invent any private right in him as a riparian proprietor." It is sufficient to say that these cases appear to me to be irrelevant, and that the question is not as to inventing a private right in the riparian proprietor, but what are the rights of a riparian proprietor actually existent which are referred to in, and saved by, the 179th section.

On the whole I cannot but arrive at the conclusion that the decree of the Lords Justices ought to be reversed, and that the decree of the Vice-Chancellor *Malins* of the 3rd of May, 1875, ought to be restored, and that it should be declared that the petition of appeal of the *Fishmongers' Company* to the Court of Appeal in Chancery ought to have been dismissed with costs.

LORD CHELMSFORD:—

My Lords, the questions for the determination of your Lordships upon this appeal are: First. What are the powers of the Conservators of the River *Thames* under the 53rd section of the Act of 20 & 21 Vict. c. cxlvii. for the conservancy of the river, and the restriction of those powers in respect to the private rights of individuals. 2ndly. Whether there is any individual right or privilege in the owner or occupier of *Lyon's Wharf* peculiar to his river frontage, distinct and different from the right of all the Queen's subjects in the highway of the river.

Upon this second question the Lords Justices said they were "unable to find any authority for holding that a riparian proprietor where the tide flows and reflows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide." But, with great respect, I find no authority for the contrary proposition, and I see no sound principle upon which the distinction between the two descriptions of natural streams can be supported. And it appears to me that cases have been decided which are strongly opposed to it. Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorized interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury.

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(1) 5 C. B. (N.S) 821 5 Jur
N.S 849

(2) Law Rep. 10 Ch. Ap. at p. 692.

The owner of *Lyon's Wharf* has a double frontage to the *Thames*, one frontage to the south and the other to the west. The west frontage he has used for the purpose of loading and unloading goods into craft, in *Winckworth's Hole*, which is admittedly part of the river *Thames*. No question of prescription enters into the case. The owner of the wharf has an undoubted right to use the river flowing up to his premises in the manner he has done, whenever that user commenced. The authority conferred by the license of the Conservators on the *Fishmongers' Company*, if exercised, would entirely fill up *Winckworth's Hole* and cut off all access of barges to the west front of *Lyon's Wharf*.

The Lords Justices held that the Conservators have power to grant this license under the 53rd section of the Act, and that this power is not restricted by the 179th section in respect of the owner of *Lyon's Wharf*, for the reason they had already given, that a riparian proprietor has no rights over the river or the shore of the river, beyond the rights of the rest of the public. They say that "the only authority which was cited for the proposition that a riparian proprietor had such rights was the case of *Rose* v. *Groves* (1), and what was said by my noble and learned friend Lord *Hatherley* in *The Attorney-General* v. *The Conservators of the River Thames* (2), which, however, was entirely founded on the case of *Rose* v. *Groves* (1)," which they thought "was not a sufficient authority for the proposition it was cited to support." "That the declaration was ambiguously framed, so that it was difficult to tell whether the pleader intended to rely on the violation of a public right or a private right." Now the case was determined upon a motion in arrest of judgment, in which the only question was whether the declaration disclosed a good cause of action. The Court unanimously held that the declaration did not complain of any public injury, and Mr. Justice *Maule* said (1): "Supposing that the declaration did allege a nuisance to a public highway, still there is a clear statement of a private injury to the individual complaining, but I think no public injury is alleged." The Vice-Chancellor was therefore justified in the passing remark he made in *The Attorney-General* v. *The Conservators of the River Thames* (2), which the Lords Justices disputed, that if the *Fishmongers' Company* had their wharf with the right of access to the river, and this were taken away, they would be within the provisions of the 179th section, and would be entitled to an injunction.

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(1) 5 Man. & G. 613.

(2) 1 H. & M. 1. 8 Jur NS 12

The Lords Justices state as the result of their judgment that the right of a wharfinger to bring an action or file a bill for an obstruction in the river that renders the access to his wharf less convenient, and one which deprives him of all means of access, depends on the same legal principle, viz.: that he suffers a particular damage from a public nuisance, and in neither case is there a violation of any private right of his distinct from the public right of navigation which is in all the Queen's subjects. And they held that they could not affirm the decision of the Vice-Chancellor consistently with the cases of *Kearns* v. *The Cordwainers' Company* (3), and *The Attorney-General* v. *The Conservators of the Thames* (2).

These cases appear to me not to have been decided upon the ground that a private right in a public river could not exist. In *Kearns* v. *The Cordwainers Company* (3), the Court of Common Pleas was of opinion that the only right which was interfered with was a right of enjoyment in the free navigation of the river which the Plaintiff had in common with the rest of the public. And in *The Attorney-General* v. *The Conservators of the River Thames* (2), the Vice-Chancellor, after making the observations with regard to the private right of the *Fishmongers' Company*, to which I have already referred, added: "but in truth the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route, but that is a mere interrup-

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(1) 5 Man. & G. at p. 622.
(2) 1 H. & M. 1. 8 Jur. N.S. 1203
(3) 6 C. B. (N.S.) 388. 5 Jur. N.S. 1246

H. L. (E.)
1876
LYON
v.
FISHMONGERS' COMPANY.

tion to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access."

The Solicitor-General argued that under the 53rd section of the Act the Conservators have an absolute and unrestricted power to authorize the owner and occupier of land fronting and immediately adjoining the river, to form an embankment into the body of the river, and that the 179th section did not apply to the power conferred by the 53rd section. But the 179th section qualifies and restricts whatever powers are vested in the Conservators by the Act. It enacts that none of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, &c., to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river are now by law entitled. But then it was said that if the 179th section did apply, the right protected by it is a right of property and not a right of action, for which the opinion of Mr. Justice *Crowder* in *Kearns* v. *The Cordwainers' Company* (1) was quoted. A right of action in the present case, which it cannot be disputed *Lyon* might have maintained against an individual obstructing the access to the west front of his wharf, would be an action for an injury to the enjoyment of his right of property. And so the obstruction authorized by the Conservators, if carried out, will take away, or at all events alter or abridge, his right to the free and lawful application of his property to the purposes of his business.

To shew that the owner of *Lyon's Wharf* has a private right which is protected by the 179th section, the counsel in the Court below cited the cases of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2) and *The Metropolitan Board of Works* v. *McCarthy* (3) decided in this House, of which the Lords Justices took no notice in their judgment, although they appear to me to be conclusive authorities in the Appellant's favour. In these cases it was determined that a riparian proprietor on the river *Thames* and the owner of lands near a public dock upon the river, were entitled to compensation in respect of their lands being injuriously affected by being deprived of access to the river and to the dock. Lord *Campbell* in *Re Penny* (4), which was the case of a

(1) 6 C. B. (N.S.) 388. 5 Jur NS 1216

(2) Law Rep. 5 H. L. 418.

(3) Law Rep. 7 H. L. 243.

(4) 7 El. & Bl. at p. 669. 3 Jur NS

H. L. (E.)
1876
Lyon
v.
Fishmongers' Company.

claim for compensation under the Lands Clauses and Railways Clauses Acts, stated this to be the test of the right, that "unless the particular injury would have been actionable before the company had acquired statutory powers, it is not an injury for which compensation can be claimed."

The Lords Justices held that *Lyon*, a riparian proprietor, had no such right of action, nor any right in respect of his property upon the banks of the river distinct from the public right of navigation in all the Queen's subjects. But when this House decided, in the above cases, that the owners of lands on the river were injuriously affected by having their access to the river cut off; as the test of such injury was the right to maintain an action, if no statutory powers had been granted, the decisions are directly opposed to the judgment of the Lords Justices, and if they had considered them, must, I venture to think, have led them to a different conclusion.

I agree that the order of the Lords Justices, reversing the decree of the Vice-Chancellor, ought to be reversed.

Lord Selborne:—

My Lords, the judgment under appeal seems to be founded upon these two propositions: First: That a riparian proprietor on the bank of a tidal navigable river has no rights or natural easements similar to those which belong to a riparian proprietor on the bank of a natural stream above the flow of the tide; Secondly: That a riparian proprietor, whose frontage and means of access to such a tidal river is cut off, by an encroachment from adjoining land into the stream, suffers no loss or abridgment of any private right belonging to him as such riparian proprietor, but is only damnified in common with the rest of the public by the diminution of the water space in the navigable stream, and by such obstruction of the navigation as may be consequent thereon.

The Lords Justices were of opinion that there was no authority at variance with these propositions. To me the propositions appear to be at variance with the opinions delivered in this House, both by the Judges who attended your Lordships and by the noble Lords who took part in the decision, in the case of *The Duke of*

Buccleuch v. *The Metropolitan Board of Works* (1), by which opinions the decision of this House in that case was governed. I also think them at variance with the views of the law, applicable to such a case as the present, which were expressed by the learned Judges who decided *Rose* v. *Groves* (2) and *The Attorney-General* v. *The Conservators of the Thames* (3). The Lords Justices thought that the latter of those two decisions would have been virtually overruled, if the judgment of the Vice-Chancellor in the present case had been affirmed; but they only arrived at that conclusion by themselves first overruling a distinction which the Vice-Chancellor, who decided that case, held, without doubt, to be well founded in law.

Upon principle, as well as upon those authorities, I am of opinion that private riparian rights may, and do, exist in a tidal navigable river. The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exist, by the common law, public rights in respect of navigation and otherwise, which do not generally (in this country) exist in the non-tidal parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belongs, generally, to the riparian proprietors, while in the estuary it belongs generally to the Crown. But the rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognise and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other purposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to me to lie on those who so affirm.

As for the public right of navigation, it may well co-exist with private riparian rights, which must of course be enjoyed subject to it; just as where there is no navigation, each riparian proprietor's right is concurrent with, and is so far limited by, the rights of other proprietors.

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(1) Law Rep. 5 H. L. 418.
(2) 5 Man. & G. 613.
(3) 1 H. & M. 1. 8 Jur. N.S. 1203

With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law. In some tidal navigable rivers (as the *Severn*) parts of the bed of the tidal stream belong to riparian owners; and it appears from Mr. *Angell's* book (1) (often quoted in our Courts) that in *Pennsylvania* and *Alabama*, states whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navigable rivers is in the State. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturæ*, as vertical; and not only the word "riparian," but the best authorities, such as *Miner* v. *Gilmour* (2) and the passage which one of your Lordships has read from Lord *Wensleydale's* judgment in *Chasemore* v. *Richards* (3), state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right.

Even if it could be shewn that the riparian rights of the proprietor of land on the bank of a tidal navigable river are not similar to those of a proprietor above the flow of the tide, I should be of opinion that he had a right to the river frontage belonging

(1) Angell on Watercourses.

(2) 12 Moo. P. C. 131.

(3) 7 H. L. C. 349. 5 Jur. N.S. 873

by nature to his land, although the only practical advantage of it might consist in the access thereby afforded him to the water, for the purpose of using, when upon the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue, and in respect of, his riparian property; it is wholly distinct from the public right of navigation. In the words of Lord Justice *Mellish* (1): "The right of embarking and disembarking, and so using his property as a wharf for the loading and unloading of goods," is, "a most valuable right," and I am at a loss to see why it should not be recognised as entitled to protection under the 179th section of the *Thames Conservancy Act*, although (as the Lord Justice went on to say), "it arises simply from the fact, that he owns land immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation."

It was admitted, that if the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would, by the deprivation of this water frontage, be "injuriously affected." But unless this was an interference with some right or privilege, recognised by law as belonging or incident to the land, it would be no actionable wrong, as an injury to the land, although not authorized by Parliament; and in that case the land would not be "injuriously" affected. If, on the other hand, it is an interference with a right or privilege recognised by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation. The cases as to alterations of the levels of public highways, by which houses immediately adjoining have been deprived of their access to and from the highway, seem to be authorities *à fortiori* on this point; because they had not in them the element of a right *jure naturæ*. If I correctly understand the Irish case of *Moore* v. *The Great Southern and Western Railway Company* (2), which was approved and followed by the English Court of Queen's Bench in *Chamberlain* v. *The Crystal Palace Railway Company* (3), those authorities recognise such a right of immediate access from private property to a public highway, as a private right, distinct from

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(1) Law Rep. 10 Ch. Ap. at p. 689.
(2) 10 Ir. C. L. Rep. (N.S.) 46.
(3) 2 B. & S. 605–617. 8 Jur. N.S. 935.

H. L. (E.)
1876
LYON
v.
FISHMONGERS' COMPANY.

the right of the owner of that property to use the highway itself, as one of the public.

That a public body, such as the *Thames* Conservancy Board, should be empowered by Parliament to sell, for money, to private persons the right to execute, for their own benefit, works injuriously affecting the land of an adjoining proprietor without compensating him for that injury, (which is the contention of the Respondents,) is inconsistent with the ordinary principles and with the general course of public legislation on such subjects. When, therefore, we find in the Act which is alleged to confer such powers a saving clause in the large and untechnical terms of the 179th section, by which (without any forced or unreasonable extension of their natural meaning) this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection.

I am, for these reasons, of opinion that the present appeal should be allowed.

Decree appealed from reversed; decree of Vice-Chancellor Malins, of the 3rd of May, 1875, *restored; cause remitted to the Court of Chancery, with a declaration that the petition of appeal of the Court of Appeal in Chancery ought to have been dismissed with costs.*

Lords' Journals, 27th July, 1876.

Solicitors for the Appellant: *Brettell, Smythe, & Brettell.*
Solicitor for the Respondents: *C. O. Humphreys.*

[HOUSE OF LORDS.]

H. L. (Div.)
1876
March 16.

CAPTAIN DE THOREN . . . . . . APPELLANT;

THE ATTORNEY-GENERAL *et al.* . . . RESPONDENTS.

Scotch Doctrine of Habit and Repute as to Marriage.

5 C.P.D. 411–4
6 App Cas 365/372
23 Ch D 175

Per LORD SELBORNE :—Habit and repute is not a mode of constituting but of proving a marriage; and when a true and undivided habit and repute is shewn, a presumption of the marriage arises by the Law of *Scotland.*

Per THE LORD CHANCELLOR (1) :—The presumption of marriage is much stronger than the presumption in regard to other facts.

When a matrimonial ceremony took place in *Scotland*, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration.

It must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.

The *onus* of rebutting a marriage by habit and repute is thrown on those who deny it.

Per LORD CHELMSFORD :—The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent.

ON the 1st of July, 1862, Mr. *William Ellis Wall* obtained from the Divorce Court at *Westminster* a decree dissolving his then marriage, but not enabling him to marry again until the expiration of the period allowed for appealing to the House of Lords, which occurred in this case on the 19th of February, 1863.

Ignorant of this temporary impediment, and thinking that he might marry again immediately on obtaining the divorce, Mr. *Ellis Wall*, at *Glasgow*, in *St. Jude's* Church, on the 16th of July, 1862, was married to—or, rather went through the ceremonial of marriage with—Miss *Sarah Ogg*, both parties honestly believing that there was no obstacle to their union. They afterwards resided together constantly as husband and wife, and were everywhere regarded and treated as such in *Scotland*, in *Ireland*, and in *England*, till the death of Mr. *Ellis Wall*, in November, 1867. Of the connection there were four children, two sons and two daughters. One of the sons, *William Ellis Wall*, was born in *Scotland*, on the 30th of August, 1866, and the other, *Edward William Wall*, was born in *England*, on the 17th of March, 1868.

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(1) Lord *Cairns.*

On the 22nd of May, 1872, the two sons, having an interest in English real property, presented by their mother and guardian a petition to the Court for Divorce and Matrimonial Causes, praying a declaration that they "were severally legitimate sons of the aforesaid *William Ellis Wall*, and *Sarah Wall*, and that the marriage aforesaid contracted prior to the birth of the petitioners was a valid marriage."

The legitimacy of the children of course depended on the validity of their parents' marriage; and the question, one of Scotch Law, was, whether the undoubted fact of continued "habit and repute" was, under the circumstances, of itself sufficient to prove a marriage, without any interchange of verbal matrimonial declaration—of which there was neither evidence nor allegation.

The Judge Ordinary asked the opinion of the Court of Session in *Scotland*, under 22 & 23 Vict. c. 63, s. 1, and obtained for answer that "before the birth of the eldest son, the parents had become married persons" (1).

Sir *James Hannen* decided that "the parents had contracted with each other a valid marriage prior to the 30th of August, 1866, and that the sons were legitimate."

Against this decision, Captain *de Thoren* appealed to the House, having for his counsel *The Solicitor-General* (Sir *H. Giffard*, Q.C.), Mr. *Matthews*, Q.C., Mr. *Thesiger*, Q.C., and Mr. *H. D. Greene*. The Respondent's counsel were *The Attorney-General* (Sir *J. Holker*), *The Solicitor-General for Scotland* (Mr. *Watson*), Mr. *Soathgate*, Q.C., Dr. *Spinks*, Q.C., and Mr. *A. E. Hardy*.

The Appellant's counsel argued that inasmuch as the parents had always regarded themselves as having validly intermarried from and after the *Glasgow* ceremonial, there was not and there could not be a subsequent interchange of nuptial consent; and the mere "habit and repute" was of itself insufficient to constitute a

(1) 4 Series of Scotch Cases, vol. i. p. 1036.

marriage; so that the decision declaring the sons legitimate ought to be reversed.

At the conclusion of the arguments on behalf of the Appellant their Lordships delivered the following opinions:—

The Lord Chancellor (1):—

My Lords, in deciding the question of legitimacy raised by this case your Lordships will not, I think, find yourselves in any way embarrassed by the particular procedure which has taken place in the Court below. The petition was filed in the ordinary way; no formal issues were framed in the case, apart from those which the case itself raised; evidence was given before the Judge Ordinary, and among that evidence was the evidence of experts with regard to the law of *Scotland*. The Judge Ordinary considered that he, sitting as an English Judge, might not be able to draw inferences as to Scotch law from the evidence tendered before him in the way that a Scotch Court could do; and, availing himself of the powers given by the Acts of Parliament relating to the subject, he sent a Case for the opinion of the Scotch Court upon a certain point, which he placed before it. The opinion of the Scotch Court was given in favour of the marriage; and therefore in favour of the legitimacy. The learned Judge Ordinary pronounced his final decree, establishing the legitimacy upon all the materials before him; and all those materials are now before your Lordships, and your Lordships sit here as a Court of Appeal, not merely from the decision of the English Court, the Court of Probate, but also, under the statute, with power to review the opinion expressed by the Scotch Court upon the case sent to them, if your Lordships think that opinion ought to be reviewed.

My Lords, the question here comes to be simply this. A man and a woman being both at the time in *Scotland*, go through a ceremony of marriage in a church. They are under the impression that the marriage is a valid one, and that they have done everything that is necessary to make it valid. The man had shortly before been divorced in *England*, that is to say, there had been a decree *nisi* of the Matrimonial Court for a divorce,

(1) Lord *Cairns*.

which decree *nisi* was afterwards made absolute. But at that time there was a certain length of time given, which has since been taken away, during which an appeal against the sentence of the Matrimonial Court might have been brought, and that time had not elapsed (1). The parties were not aware that that circumstance created an impediment to a valid marriage. Having gone through the ceremony they lived as husband and wife, and were reputed to be husband and wife. They had children; and those children were treated as being legitimate. There was a question of succession to real property in the case, and it is clearly shewn that the man was anxious to have legitimate children, and believed that he had legitimate children who would succeed to that property. They resided, subsequently to the marriage ceremony, for some years in *Scotland,* and for another part of the time out of *Scotland.* Under those circumstances, putting aside for the moment any inference which ought to be drawn from the fact of both parties being ignorant of the impediment to marriage, and looking merely to the habit and repute to which I have referred, and which continued altogether for a period of, I think, about ten years, and until the death of the man; looking merely to these facts there cannot be any doubt (indeed, it is not disputed at the Bar) that there would be ample ground for presuming, according to the law of *Scotland,* that marriage by consent of which cohabitation with habit and repute is evidence.

But it is said that the inference of marriage is rebutted, because you have here the parties commencing their cohabitation under the belief that the ceremony of marriage was a valid ceremony, and that, therefore, unless you can shew that they afterwards were undeceived upon this point, and in some way or other actually must be taken to have assented or consented to a fresh contract of marriage, you cannot imply from the cohabitation with habit and repute that a marriage by the interchange of consent actually took place.

Now, my Lords, I cannot in any way accept that argument. I may refer, in the first place, to the case of *Piers* v. *Piers* (2) before your Lordships' House, in which, although the facts were in many respects different from the present, yet it was held in a most striking way as a general rule that the presumption of marriage is not the same as the presumption raised with regard to other facts, which may be presumed either the one way or the other; that the presumption of marriage is something much stronger; and that from cohabitation with reputation a marriage is to be presumed unless there is strong and cogent evidence to the contrary. One of the most striking cases that can well be imagined upon this subject is the *Breadalbane Case* (1), in which the presumption was held to be one that not only might be drawn but ought to be drawn from the cohabitation with habit and repute, although in that case the cohabitation commenced with a ceremony of marriage which not only was invalid by reason of the real husband of the woman being alive at the time, but was known to both parties to be invalid. Your Lordships held that, notwithstanding that the marriage could not have been valid at the inception, notwithstanding that both parties knew that it was invalid, notwithstanding that both must have known that at the commencement of their cohabitation that cohabitation was illicit; still the presumption of marriage might and ought to be drawn.

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(1) As to liberty to divorced parties to re-marry, see 31 & 32 Vict. c. 77, s. 4, and 36 Vict. c. 31 (1873), and *Browne* on Divorce, p. 484.

(2) 2 Cl. & F. 331.

My Lords, I own it appears to me that that was a somewhat stronger case than the present, because it might well have been fairly contended, and it was contended with great energy, that any presumption of marriage ought to be held to be rebutted by the fact that the cohabitation at the beginning could not have been intended by the parties themselves to be a cohabitation for the purpose of marriage, because they must have known that their marriage could not be valid. Here, on the contrary, the cohabitation began with the full intention of the parties themselves that their cohabitation should be upon the footing of a legitimate and valid marriage, and they were under the impression that there was a legitimate and valid marriage. If that is so I ask, Why should it not be presumed from the cohabitation with habit and repute that as soon as that obstacle was removed, which it very shortly was, a consent was exchanged between the parties to be husband and wife, when you would make that presumption in a case such as the *Breadalbane Case* was.

My Lords, I will refer to the *Breadalbane Case* for the pur-

(1) Law Rep. 2 H. L., Sc. 269.

pose of reminding your Lordships of some, or at least of one of the opinions that were there expressed. Lord *Westbury* says:

> The Appellant objects that cohabitation, which began when the parties were incapable of contracting marriage, and which was continued without change, is ineffectual to form the basis of the conclusion that consent to marry was interchanged after the impediment to marriage had been removed. That would be a very important rule if it were proved to be well founded; but I am unable to find any principle to justify the introduction of such a rule; and what is more material to the purpose, I am unable to find any case or any book of authority in which that principle has been either followed out into a decision or has been laid down as a rule of Scotch law. There is nothing to warrant the proposition that the subsequent conduct of the parties shall be rendered ineffectual to prove marriage by reason of the existence at a previous period of some bar to the interchange of consent. It would be very unfortunate if it were so. Marriage may be contracted between parties in a foreign land where certain observances are required which *from ignorance or mistake may not have been fulfilled.*

So that, your Lordships will observe, Lord *Westbury* here puts as an illustration the very case which here occurs. He continues:

> The parties having cohabited on the strength of an *imperfect celebration*, may afterwards come to *Scotland* and reside there for years, continuing the same course of life. It would indeed be a very sad thing if such a course of conduct, lasting, perhaps, for twenty or thirty years, were insufficient to warrant the conclusion of marriage. There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation. I think a sounder rule and principle of law will be that you must infer the consent to have been given at the first moment when you find the parties able to enter into the contract.

The argument at your Lordships' Bar has consisted principally of a minute criticism of the wording of the Case sent by the Judge Ordinary for the opinion of the Scotch Court, and an attempt to establish that the wording of that case merely amounts to certain findings by the Judge Ordinary which in some way established as matters of fact the statements which are made for the particular purpose of this case. I do not myself read these statements as doing more than saying, on the part of the Judge Ordinary to the Scotch Court, that he cannot point to specific evidence of an exchange of consent, but leaving entirely to the Scotch Court the duty, if it be their duty, and if they think it is their duty, to draw the inferences which the Scotch Law would warrant. For example, my Lords, the principal statement relied upon in that case is this: Paragraph 5 states—

> From the time of the said marriage ceremony on the 16th of July, 1862, till

the death of the said *William Ellis Wall*, which occurred at *Sidmouth*, in *England*, on the 23rd of July, 1871, he and the said *Sarah Ogg* constantly, continuously, and openly, lived and cohabited together as husband and wife, and were holden and reputed to be so by their relations and friends and by all who knew them. They so lived and cohabited together in *Scotland* from the 16th of June, 1862, till May, 1863; in *Ireland* from May, 1863, till March, 1864; in *Scotland* from March, 1864, till November, 1867; and in *England* from November, 1867, till the death of the said *William Ellis Wall*. The habit and repute which attended from cohabitation from the first and throughout was undivided.

The 6th paragraph states—

> The said *William Ellis Wall* and *Sarah Ogg* intended to contract marriage together. The marriage ceremony of the 16th of July, 1862, took place in pursuance of that intention. They believed, and never prior to the death of the said *William Ellis Wall* ceased to believe, that the marriage ceremony was lawful and valid, and throughout their cohabitation they intended to stand to each other in the relation of husband and wife, and believed that they did so, and their said treatment of each other as husband and wife, and of their children as legitimate offspring, was due to this belief. The said *William Ellis Wall* and the said *Sarah Wall* did not at any time after the said 16th of July, 1862, interchange or express to each other any consent to marry, or make any acknowledgment with the purpose of contracting a marriage, unless such consent or acknowledgment is to be inferred as a presumption of law from the facts herein stated.

My Lords, I rather incline to the opinion that that amounts to nothing more than a statement that, except as far as a presumption of law was proper to be drawn from the facts, it had not been affirmatively and directly proved before the learned Judge that there was any interchange of consent to marry. And undoubtedly no such exchange of consent was proved. If it had been proved the reference to cohabitation with habit and repute would have been altogether unnecessary. But I certainly hold that your Lordships are here entirely free to look at once at the evidence given before the learned Judge and at the judgment of the Judge Ordinary founded upon that evidence, and that your Lordships are not in any way fettered, as I have said, by the statement of facts which was made for one purpose, and one purpose only, namely, to obtain the opinion of the Scotch Court.

Turning to the evidence given before the Judge Ordinary, your Lordships find that Mrs. *Sarah Wall* was examined. In her direct examination she proves that after the marriage ceremony in July, 1862, she lived with *William Ellis Wall* as her husband till his death; that children were born; that during the lifetime of

William Ellis Wall they visited and were visited as husband and wife, and treated each other constantly in all respects upon that footing; that their children were received as legitimate, and no doubt existed in their own minds that they were so; that Mr. *Wall* was anxious for a son, that he told her so, and the reason was that he was to inherit entailed property in *England;* that when they lived at *Dalkeith* they were visited by the father and mother of *William Ellis Wall*, who took away the eldest girl on a visit. Certain letters are then put in passing upon the footing of their being husband and wife. That being the evidence in chief, she is then cross-examined by those who were interested to rebut the presumption of law, but in her cross-examination she is not asked one single question with the view of negativing the presumption, or of proving that no consent passed between them, after the impediment to marriage was removed. My Lords, if that is so, if those who have the *onus* of rebutting the presumption cast upon them take no step to rebut that presumption, I apprehend that the presumption remains in its full force and vigour.

Upon these grounds, my Lords, I submit that the decision of the Judge Ordinary establishing the legitimacy in this case is entirely correct, and that this appeal ought to be dismissed with costs.

Lord Chelmsford :—

My Lords, the question to be determined is whether there was a consent to a marriage between *William Ellis Wall* and *Sarah Ogg*, evidenced by habit and repute, prior to the birth of the elder of the sons. If there were no other question than this in the case there would be no difficulty in giving an answer in the affirmative. But the Appellant, though he admits that there had been such cohabitation of the parties as husband and wife as in an ordinary case would have conclusively established the presumption of a marriage by consent, yet contends that the circumstance of a previous ceremony of marriage having taken place between the parties, which was invalid, though unknown to them to be so, prevented that presumption. The ground of this argument is that the living together of the parties as husband and wife must be attributed to the invalid ceremony, and therefore that the habit and repute could not be evidence of any other consent.

In the case sent by the Judge Ordinary it is stated that prior to the death of *William Ellis Wall*, he and *Sarah Ogg* never ceased to believe that the marriage ceremony was lawful and valid. There was no evidence given before the Judge Ordinary to this effect. Mrs. *Wall* was called as a witness, and no question to elicit that fact (if it existed) was put to her. If, then, the case is to be disposed of upon the facts, without reference to the Case prepared to obtain an opinion as to the law, it appears to me to be quite open to your Lordships to presume (especially in favour of the legitimacy of the sons) that knowledge of the invalidity of the marriage was acquired during the cohabitation, and that the parties subsequently lived together as husband and wife. If it be asked why, with this knowledge, they did not marry openly *in facie ecclesiæ*, it may be answered that probably they did not desire to have it known that they had been cohabiting without being lawfully married, and that it was unnecessary in *Scotland*, as their continuing to live together as man and wife afterwards would be of equal efficacy with an actual marriage.

But taking the facts as they are stated in the Case, and applying the law to them, the Court of Session is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet after the removal of the impediment to their marriage and before the birth of their eldest son, they became married persons.

I agree entirely with this opinion. A marriage is established by habit and repute on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract the relation. If any legal impediment exists to prevent their marrying, as long as it continues no presumption of consent can arise. But if the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and repute may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse.

In the present case the ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent.

H. L. (Div.)
1876

De Thoren
v.
Attorney-General.

But the Appellant seeks to displace the case founded on habit and repute altogether by reason of the invalid ceremony of marriage, to which he contends the consent must necessarily be referred. Assuming this to be correct, the proof of consent being unquestioned, what difference can it make that the motive to such a consent was an erroneous belief that the parties had the sanction of a legal marriage. The habit and repute arising from the parties having lived together as husband and wife for many years was amply sufficient to prove their consent to contract this relation. Can the invalid ceremony of marriage, which strengthens the proof of consent, have the effect not merely of weakening, but of entirely destroying, that proof? No valid consent could, of course, be given during the time allowed for appealing against the decree of divorce. But as soon as that time had passed there was nothing to prevent the marriage of the parties, or to invalidate any consent to become husband and wife; and their living together so many years as married persons raised a presumption of their consent to contract that relation, which could only be rebutted by proof of some fact which raised an impediment to their marriage.

Lord O'Hagan:—

My Lords, the Appellant's case rests really on the 7th paragraph of the paper submitted by the Judge Ordinary to the Scottish Judges. He insists that it sufficiently negatives any interchange of consent to marry, or any acknowledgment with the purpose of contracting marriage, between the father and mother of the Respondents at any time after the invalid ceremony of the 16th of July, 1862. Unless it amounts to such a negation, and unless your Lordships are bound to accept and act upon it, this appeal must be dismissed. There is no other foundation for it, and so the learned Counsel for the Appellant have admitted at the Bar.

I am clearly of opinion that it does not negative either the interchange or the acknowledgment; and even if it did, it would not avail the Appellant as against the evidence in the case. It is not at all a positive negation of consent, for it is qualified by the concluding words, "unless such consent is to be inferred as a presumption of law from the facts herein stated." If those facts raise that presumption, its negative force is gone and the consent is established. And so the Scottish Court has held, and so the Judge Ordinary has found, acting on its authority.

But I fully agree that even if the Appellant's construction of the paragraph had been maintainable, it would not have been conclusive on this House. The whole matter is before your Lordships. You have the entire evidence open to your consideration. The Judge Ordinary has no power, by statute or otherwise, to coerce your judgment; and long cohabitation, with habit and repute attached to it, being proved by perfectly uncontradicted and unchallenged testimony, I think your Lordships would have been fully justified in inferring the consent which makes a marriage, according to the usages of *Scotland,* even if you had not the advantage of finding that inference justified by the unanimous opinion of the learned Judges.

The Judge Ordinary sought to be informed as to the presumption of law which, according to the Scottish law, would arise upon the facts in proof. The Dean of Faculty, on behalf of the Respondents, here puts the case very strongly: "The presumption is unavoidable," he said, "and therefore, as I say, necessary; and if your Lordships have before you proof of cohabitation, and of habit and repute following on that cohabitation, you *must* declare the persons husband and wife." With that contention the Court agreed and found accordingly in favour of the marriage. They could not have done otherwise without setting at naught the highest legal authorities of *Scotland.* "Marriage," says *Erskine* (1), "may be entered into when the consent is not express, but is discovered *rebus ipsis et factis.* In this way it is presumed or inferred from cohabitation, or the parties living together at bed and board, joined to their being habited and reputed man and wife." And *Stair* writes to the same effect: "Cohabitation and behaving as man and wife for a considerable time presumeth marriage, though there be neither contract, promise, nor *spousalia* preceding, nor evidence of copulation by children." And *Erskine* (2) describes a *presumptio juris* as "that which is in general terms established by our decisions as a presumption," "so that it is taken for true only till the contrary shall appear to the Judge to be supported by stronger evidence."

(1) Book I. title 6, sect. 6.

(2) Book IV. chap. ii. sect. 36.

H. L. (DIV.)
1876
DE THOREN
v.
ATTORNEY-GENERAL.

I do not trouble your Lordships by referring again to the cases in *Scotland* and in this House which fully sustain these expositions of the law. Cohabitation and repute do not constitute the marriage, but are the evidence from which the consent essential to it is conclusively presumed, in the absence of countervailing proof to the contrary. No formal solemnization, no agreement by writing or in words, is needful to its validity. If the parties live together for many years as husband and wife, believe themselves to be so, mean themselves to be so, and are reputed to be so, as in this case, by all the world, until the death of one of them, the presumption unrebutted supplies the want of formal ceremony or express contract, and validates their marriage, with all its legal incidents.

I can add nothing of value to what has been said by my noble and learned friends in reply to the argument founded on the void marriage of 1862. The parties were then undoubtedly consenting to the union which both desired, and I am unable to see that there is anything in the case which would justify your Lordships in disregarding the relations maintained by them until the husband's decease and the recognition of their marital *status*, as giving proof of continuing consent, because the acts by which they had striven to demonstrate it, in the first instance, failed of legal operation. They designed to be husband and wife; they demeaned themselves as husband and wife; they were accepted by their neighbours and all who knew them as husband and wife; and the ingenious argument of Mr. *Matthews* that all this was of no account to raise a presumption of consent because they had made an abortive attempt to marry formally, seems to me quite unsupported by authority, and to have no countenance from the reason of the thing, or from the social policy on which the Scottish law and usage have been based. On this point the judgment of Lord *Westbury* in the *Breadalbane Case* is very forcible against the Appellant.

I am therefore of opinion that the decision of the Judge Ordinary should be sustained, and the appeal dismissed with costs.

LORD SELBORNE:—

My Lords, the argument for the Appellants rested, first, upon a construction of the 7th paragraph of the Case stated by the learned

Judge Ordinary for the opinion of the Court of Session, which (in my judgment) was entirely erroneous; and, secondly, upon an attempt to get rid of the legal presumption arising, according to the law of *Scotland*, from the doctrine of "habit and repute," and to reduce the question of marriage or no marriage, in this case, to one of evidence as to the constitution of a formal marriage *per verba de præsenti* at some period subsequent to the 16th of July, 1862.

Upon the first point I am clear that the learned Judge did not state, or intend to state, as a fact, that there was never, after the 16th of July, 1862, any interchange or expressed consent to marry, or acknowledgment with the purpose of contracting a marriage, between *William Ellis Wall* and *Sarah Wall*, but that he merely stated that the question, whether there was or was not such interchange, consent, or acknowledgment, was to be treated, for the purpose of the Case, as depending solely upon such presumptions or inferences (if any) as the Scottish law would draw from the other facts stated in the preceding paragraphs numbered 5 and 6.

I must add that the facts stated (for the purpose only of the Case) in the paragraph numbered 6a, appear to me to be stated very much more favourably for the Appellant than was warranted by the evidence before the Judge Ordinary, which did indeed shew that the parties whose marriage was in question believed themselves, on the 16th of July, 1862, to have been lawfully married by the ceremony which then took place, but which certainly did not prove that they never afterwards during the lifetime of *William Ellis Wall* became aware of the legal invalidity of that ceremony: on which point (if material to the result of the case) the burden of proof, in my opinion, rested entirely on the Appellant.

I also think that there is no ground for treating the statements in this Case as so many findings by the learned Judge Ordinary upon questions of fact. Those statements were made solely for the purpose of obtaining an opinion from the Court of Session as to the conclusions of the law of *Scotland* upon the hypothesis of the facts so stated. If the evidence which was before the Court did not establish that hypothesis of facts on any material point, it is, in my opinion, the duty of your Lordships now to have regard solely to that evidence and not to the statements in the Case.

Taking this view, I entertain no doubt that the conclusion arrived at by the Court below, that the children of *William Ellis Wall* and *Sarah Wall* were legitimate, was, upon the evidence before the Court, and having regard to the law of *Scotland*, entirely correct.

With respect to the law of *Scotland*, I apprehend that the argument for the Appellants at the Bar was at variance with the principle of that law so far as relates to the presumption of marriage from habit and repute. It is indeed true that habit and repute is not, by the law of *Scotland*, a mode of *constituting*,—it is only a mode of *proving* marriage. It is, however, an error to suppose that what is called habit and repute is a mere element of proof directed to the establishment of the actual constitution of marriage at some moment of time, supposed to be single and definite, though not precisely ascertained by such mutual declarations as would be necessary for the direct proof of a marriage *per verba de præsenti*. Consent to be married persons (it matters not in what manner expressed, nor whether expressed at all, otherwise than tacitly, *rebus et factis*) is all that it is necessary to infer in these cases, from habit and repute—the mutual consent, and not the mode of declaring or interchanging it, being that which, by the law of *Scotland*, constitutes marriage. When a true and undivided habit and repute of marriage is shewn, a presumption of that marriage from that habit and repute at once arises by the law of *Scotland*. It is true that this presumption may be rebutted; but the *onus* of rebutting it is thrown by the law (as I understand it) on those whose interest it is to deny the marriage. Nor does this presumption rest on decided cases, or on the authority of the great text-writers of the Scottish law only. It is expressly recognised and confirmed by the statute of Jac. 4, c. 77, of 1503, which was mentioned during the argument at the Bar. That statute relates immediately to the claims of widows to their tierce; but it is manifest that the presumption which holds in the case of the widow's tierce must hold equally in the case of the children's legitimacy. The question in the present case arose in the exact state of circumstances contemplated by the statute, viz., after the death of the reputed husband, the marriage never having been challenged during his lifetime. In that state of circumstances the statute says: "It is statute and ordained *anent the exceptions* proponed against widows, pursuing and following their benefices of tierce, or the profit of their tierce, *which is oft-times proponed against those widows, that they were not lawful wives to the persons their husbands, by whom they follow their said tierce.* That, therefore, *where the matrimony was not accused in their lifetimes, and that the woman asking this tierce being repute and holden as his lawful wife in his lifetime, shall be tierced and brook her tierce* without any impediment or exceptions to be proponed against her, *until it be clearly decerned and sentence given that she was not his lawful wife,* and that she should not have a lawful tierce therefor;" distinctly, therefore, by statute throwing, in all such cases, the *onus* of proof upon the persons who deny the marriage. In my opinion, therefore, it would have been entirely contrary to the presumption of Scotch law, and a great miscarriage of justice, if the legitimacy of the children had not been established upon the evidence in this case.

Decree appealed from affirmed, and appeal dismissed with costs.

Agent for the Attorney-General: *E. L. Rowcliffe.*

Agents for the Appellant: *Vallance & Vallance.*

Agents for the Respondents: *Tatham, Procter, Tatham, & Procter, London*; and *Thomas Barneby, Worcester.*

[HOUSE OF LORDS.]

RAMSAY *et al.* . . . . APPELLANTS;

BLAIR . . . . RESPONDENT.

H. L. (Sc.)
1876
May 22.

22CLD35

Grants reserving Minerals.

Case in which three grants of land, reserving the minerals, but each reservation varying in substance and expression, were held to have respectively secured, and not to have secured, a right to carry outside minerals underneath and through the land granted.

Remarks by Lord *Chelmsford* and Lord *Selborne* as to the question whether the rights reserved were rights of property, or rather in the nature of privileges, servitudes, or easements.

IN this case the suit was instituted by Mr. *Blair* against Mr. *Ramsay* of *Tilliecoultry* and the *Alloa Coal Company*, to prevent them from carrying their coal works under Mr. *Blair's* lands, forming portions of the *Tilliecoultry* estate, which had come to him at different periods from the *Ramsay* family, as Superiors thereof.

The defence of Mr. *Ramsay* and of the *Alloa Coal Company* was that in the grants to Mr. *Blair* there were reservations which entitled them not only to work the coal under Mr. *Blair's* land, but also to make and use passages through it for the transmission of coals lying outside and beyond his boundaries.

Mr. *Blair* had three distinct grants of contiguous parcels of land, with reservations of the coal underneath. In 1825, one parcel was granted "reserving the coals and coal-heughs." In 1857, another parcel was granted "reserving the coal, with power to dig for, work, and carry away the same, on paying the surface damage."

A much larger retention appeared in the grant of 1827, the reservation "specifying the whole coal, stone quarries, and all other metals and minerals within the said land and with power to search for, work, and carry away the same, paying all damages."

The Lord Ordinary (1) decided as to the grants of 1825 and

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(1) Lord *Mackenzie*.

1857, that the Appellants had no right to carry outside coal or other minerals through the Respondent's lands, whether below or above ground, except through coal wastes, or through the land granted with the large reservation of 1827. The Second Division confirmed the Lord Ordinary's decision (1); and thereupon Mr. *Ramsay* and the *Alloa Company* appealed to the House, having for their counsel Mr. *John Pearson*, Q.C., and Mr. *Cotton*, Q.C.

Mr. *Southgate*, Q.C., and Mr. *E. Kay*, Q.C., appeared for the Respondent.

At the close of the argument on behalf of the Appellants, the following opinions were delivered by the Law Peers:—

LORD CHELMSFORD:—

My Lords, it seems to me, as I believe it seems to your Lordships, that there is no difficulty whatever in this case, and that there is no necessity to hear the counsel for the Respondent.

The simple question arises upon three grants with reservations made by the Appellant, Mr. *Ramsay* of *Whitehill*. These grants were made in 1825, 1827, and 1857. The first, that of 1825, contained this proviso:

> Reserving always to me, my heirs and successors, the coals and coal-heughs, all of the said haill lands to be won and disposed upon by me and my foresaids at our pleasure.

The grant of 1857 is said to be practically in the same terms; the reservation is—

> Excepting always the coal within the said several subjects to the said *James Blair*, which coal is hereby expressly reserved to the said *Robert Balfour Wardlaw Ramsay*, with full power to him to dig for, work, win, and carry away the same, on paying the surface damages which the ground may thereby sustain.

With regard to those grants, there can be no doubt at all that the only reservation is of the coal under the surface, and the grantor would have no power whatever to carry under those lands any coals or minerals won and worked from any other lands.

The reservation in the grant of 1827 is more extensive. It is:

> Reserving always to the said *Robert Wardlaw Ramsay* and his heirs and

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(1) Scotch Cases, 4th Series, vol. iii. p. 25.

H. L. (Sc)
1876
RAMSAY
v.
BLAIR.

successors the whole coal, stone quarries, and all other metals and minerals within the said three acres of the lands hereby disposed, with power to search for, work, and carry away the same, they always paying to the said *James Blair* and his foresaids all damages."

Undoubtedly under that grant the whole of the land under the surface, all the coals, and all the metals and minerals, were reserved to the grantor, and it gave him a right of course as upon his own property to make any way for any coals or other minerals that he might have in any other part of his lands. But in this case he could not use that power, because there were barriers on either side which prevented access to that underground by reason of the grants of 1825 and 1857.

My Lords, the Judges have been unanimous on this subject, and are of opinion that Mr. *Ramsay* had no power whatever to use the underground of the lands reserved for the purpose of carrying away coals or minerals from any other lands which were not granted.

I cannot help observing that I think Lord *Ormidale*, in giving judgment in this case, has stated that which is not perfectly correct, because he says that the reserved right to work and carry away the coal was not of the nature of a proprietary right, but rather of the nature of a "privilege, servitude, or easement." Now, it appears to me, that being upon a grant or reservation of minerals, *primâ facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted, or reserved, as a necessary incident. As was said by Lord *Wensleydale* in the case of *Rowbotham* v. *Wilson* (1): "It is one of the cases put by *Sheppard's* Touchstone in illustration of the maxim, '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit,*' that by a grant of mines is granted the power to dig them." This power to dig would of course be futile unless it involved the right of bringing to the surface. A necessary incident to a grant cannot therefore, in my opinion, be styled a "privilege, servitude, or easement."

I think the matter is perfectly clear, and I move your Lordships that the interlocutor of the Court of Session be affirmed.

(1) 8 H. L. C. 360. 6 Jur N.S. 765

LORD HATHERLEY :—

My Lords, I am entirely of the same opinion.

In the case of the *Duke of Hamilton* v. *Graham* (1) it was clearly pointed out what the exact right of a proprietor was in respect of a property excepted from a demise; and as to which therefore all the original rights of the demising proprietor remained, together with all the incidents to that property necessary to its working and enjoyment, that which the owner has reserved to himself being as much his as other parts of his land of which he has made no demise whatever. In the Duke of *Hamilton's* case it did not appear from the evidence that he was exceeding that right; it did not appear that he was using for any purpose whatsoever anything but that portion of the mineral property which he had actually reserved, and over which he had entire and complete *dominium;* and, therefore, it was held that he was not transgressing his own grant or departing in any way from it. But as respects the power of working, whether incidental to the reservation of the property, or expressly specified in the instrument, no right of property is attached to that—it is simply a right of availing yourself of that property which you have reserved to yourself in the lands in question.

Now the right which has been reserved in this case is only a right to the coals under the lands which have been parted with; that is to say, a right to the portion of the coal situated under the surface demised to the Respondent; and nothing can be done beyond the purpose of working the coal under the Respondent's lands and no other coal. That really seems to me, my Lords, the simple principle upon which the Court has proceeded; and as to the question of interpretation, I do not see how we can give to the words " coal and coal-heughs " (whatever coal-heughs may mean) any interpretation going such a length that it would amount to a reservation of all the wastes between the different seams of coal in these lands. As regards the intervening piece of land demised by the grant of 1827, the reservation is more extensive. The reservation there is of " the whole coal, stone quarries, and all other metals and minerals within the " lands demised, " with power to search for, work, and carry away the same." If those who advised Mr. *Ramsay* with regard to the granting of his leases, had happily thought of drawing the other two leases in the same form, it is possible that he might have found himself in a more favourable position; but as things stand I have no hesitation in coming to the conclusion that the Respondent is right; and that the appeal ought to be dismissed.

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(1) Law Rep. 2 H. L., Sc. & Div. App. Ca. p. 166.

LORD SELBORNE:—

My Lords, the question seems to me to be a very simple one, both in fact and in law.

The engineer, Mr. *Simpson*, finds in the report, which is the only evidence as to the facts, that the level cross-cut which he speaks of by the word "mine" "runs under the Pursuer's lands partly in the *Cherry* coal waste and *Splint* coal waste, and partly in other strata," and that the strata through which the mine passes other than the coal consist chiefly of shale and sandstone. The interlocutors under appeal have recognised the right of the Appellants to carry through the coal and the coal wastes whatever he is able to carry through them without any interference on the part of the Pursuer, but have denied him that right as to the other strata, stated here to consist chiefly of shale and sandstone. The only possible question that I can see is, whether by the grants of the two feus of 1825 and 1851 those other strata of shale and sandstone passed in fee to the feuar, who was the Pursuer in the action, or were reserved and excepted in favour of the Appellant.

Looking at the terms of the grants I can see no ground whatever for raising so much as a doubt that those other strata of shale and of sandstone passed to the feuar, and were not reserved or excepted in favour of the Appellants. In the first grant the only thing excepted is whatever is properly described by the words "coals and coal-heughs." The expression "coal-heughs" is interpreted to mean coal pits. As there were no open pits at that time under this land, I take that as equivalent to coal mines; but coals and coal mines mean, I apprehend, when unopened mines are spoken of, nothing more nor less than the veins or seams of coal underlying the surface. Whatever he can do within the limits of those veins or seams, whether before or after their exhaustion by work-

H. L. (Sc.)
1876
Ramsay
v.
Blair.

ing, is still permitted to him by these interlocutors, and the question arises solely as to the other strata, which are neither coals nor coal mines. With respect to the third grant, there is even less apparently upon which the argument can be founded than in the first, because the words "coal-heughs" are not there, but only "the coal."

My Lords, I must take the liberty of saying that I think Lord *Ormidale* was not so far wrong in the language which he used. No doubt the right to work coal which is reserved under land otherwise granted is a right connected with property in the person who makes the reservation in his own favour, and not like an easement in gross, something independent of, something unconnected with the reserved property. Still, so far as it is a right to be exercised not within the *solum* which is reserved, but over and through the *solum* which is granted, I cannot but think that Lord *Ormidale* was justified in describing it by the words "privilege, servitude, or easement."

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Agents for the Appellants: *Holmes, Anton, Greig, & White.*
Agents for the Respondent: *Grahames & Wardlaw.*

[PRIVY COUNCIL.]

GEORGE MEREDITH BELL . . . . . . APPELLANT;

AND

THE RECEIVER OF LAND REVENUE OF SOUTHLAND . . . . RESPONDENT.

J. C.*
1876
March 10, 11.

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

Southland Waste Lands Act, 1865—*Statutory Contract.*

5 App Cas
72-9

The Appellant, under sect. 12 of the *Southland Waste Lands Act* of 1865, on the 7th of July, 1873, caused his name to be entered in the application book mentioned therein as a person desirous to make an application to the Board for a grant of certain Crown lands. At that date the price of such lands was £1 an acre; but on the 9th of the same July the price thereof was raised to £3 an acre, the applicant receiving immediate notice thereof. On the 10th of July the Appellant's application was presented to the Board, which then determined that he was entitled to purchase the land, no price being specified either in the application or by the Board.

Upon a rule *nisi* for a mandamus to the Receiver of Land Revenue to receive payment from the Appellant at the rate of £1 per acre for the said lands:—

Held, that the grant of the application must be taken to have been at the price ruling on the 10th of July, namely, at £3 an acre, and not at the price ruling at the date of Appellant entering his name in the application book.

THIS was an appeal from a judgment of the Court of Appeal of *New Zealand* (Dec. 10, 1874), reversing a judgment of the Supreme Court of *New Zealand* (Oct. 30, 1874), by which it had been ordered that a rule *nisi* which had been obtained by the Appellant calling upon the Respondent to shew cause why a writ of mandamus should not issue directed to the Respondent commanding him to receive from the Appellant payment at the rate of 20*s.* per acre for certain Crown lands which the Appellant had applied for or elected to purchase under the *Southland Waste Lands Act*, 1865 (29 Vict. No. 59), and upon the receipt of the said purchase-money, together with the estimated costs of surveying the said lands, to deliver to the Appellant certificates in due form of law that the said lands had been disposed of in con-

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* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

J. C.
1876

BELL
v.
RECEIVER OF LAND REVENUE OF SOUTHLAND.

formity with the said Act, and that all moneys due in respect thereof had been received by him in cash, should be made absolute.

The facts appear in the judgment of their Lordships.

Mr. *Fitzjames Stephen*, Q.C., and Mr. *J. D. Wood*, for the Appellant, contended that he was entitled to purchase the Crown lands for which he applied at the rate of £1 per acre, which was the price fixed at the time when he made his application. That application was complete when a written application in the proper form for the land was, on the 7th of July, 1873, lodged with the proper officer of the Waste Lands Board, and an entry in the proper form was made in the application book. The Appellant thereby, on the 7th of July, 1873, acquired an indefeasible right to purchase the land at the rate of £1 per acre. He, on the proper construction of the *Waste Lands Act*, 1865 (see especially sects. 12 and 26), obtained a statutory right so to do: see *Blackwood* v. *London Chartered Bank of Australia* (1). Even if the Appellant's application ought not to be considered as having been made on the 7th of July, 1873, it ought to be considered as having been made on the next day, being the day on which the Board sat and might have considered the Appellant's application.

Mr. *Leith*, Q.C., Mr. *R. E. Turner*, and Mr. *Gilmour*, for the Respondents, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

In this case *George Meredith Bell* obtained a rule *nisi* calling upon the Receiver of Land Revenue of *Southland*, who is the Respondent in this case, to shew cause why a mandamus should not issue commanding him to receive from the Appellant payment at the rate of 20*s*. per acre for certain Crown lands which the Appellant had applied for or elected to purchase under the *Southland Waste Lands Act of* 1865, 29 Vict. No. 59. The Supreme Court after hearing the case made that rule absolute, upon which the Respondent appealed to the Court of Appeal for *New Zealand*, and that order making the rule absolute was reversed. Mr. *Bell* now appeals to Her Majesty in Council against the decision of the Court of Appeal.

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(1) Law Rep. 5 P. C. 110.

The question depends upon the true construction of the Act, 29 Vict. No. 59, the *Waste Lands Act of* 1865. Sect. 6 is as follows: "There shall be established a board, called the Waste Lands Board, to consist of one chief commissioner, and of not less than three nor more than five other commissioners, all of whom shall be appointed and be removable by warrant under the hand of the superintendent." By sect. 7 it was enacted that the Waste Lands Board should sit at the principal land office of the province at certain stated times, to be determined by the superintendent; and it appears by the second paragraph of the affidavit of the Appellant, that the days fixed were Tuesday and Friday in every week. Sect. 10 enacted that "all applications for land and for pasturage and for timber licences shall, after hearing evidence when necessary, be determined by the Board at some sitting thereof." Sect. 12, which is one of the important sections of the Act, enacted that "a book, to be called the 'application book,' shall be kept open during office hours at the land office, in which the name of every person desiring to make any application to the Board shall be written in order by himself or any person duly authorized on his behalf." According to this section, all that the applicant is to do is to write his name in the application book as a person desirous to make an application; and in this particular case the entry, which was made in the book on the 7th of July by Mr. *Macpherson* as the agent for Mr. *Bell*, was in the following terms:—"*G. M. Bell* per *Wm. Macpherson*, 7th July, 1873." He merely wrote the name and the date of writing it. The section goes on: "And the Commissioners shall, during the sittings of the Board, consider and determine all applications in the order in which they shall appear in the application book: Provided that if any person shall not appear himself or by some person duly authorized on his behalf before the Board when called in his turn, his application shall be dismissed until his name shall appear again in the book in order." A little confusion arises from the use of the word "application" in this section. The word "application" s referred to in the first portion of the section in this way, "every person desiring to make any application." Then, in the second part, it is said that all applications shall be considered and determined in the order in which they shall appear in the application book. But the Act does not require the terms of the application itself to appear in the book; it merely requires the name of the person desirous of making an application, and the true construction of the word "applications" in the second portion of this section is, applications of the intention to make which to the Board applicants have given notice. Then the third portion of the section says, "Provided that if any person shall not appear himself or by some person duly authorized on his behalf before the Board when called in his turn,"—that is, according to the order in which his name appears in the application book—"his application shall be dismissed;" that is to say, unless he appears he shall not be at liberty to make an application. Nothing is said in the Act of delivering or lodging a written application, specifying the particular land for which it is the intention of the applicant to make application. It had been the practice of the Board (probably they had made some rule on the subject), as appears by the fourth paragraph of the Appellant's affidavit, to hear and determine only such applications for land as had been lodged with the proper officer of the Board at least the day previous to the day on which the Board met for the transaction of business. Now, the lodging of the application was not the presenting of an application to the Board; applications to the Board were not presented until the day of their sitting. In paragraph 5 of the affidavit it is said, "That at such sittings as aforesaid of the said Board, the applications for land were opened and considered in the order in which the applicants' names appeared in the said application book." It appears, therefore, to their Lordships that the 12th section of the Act merely required an entry in the book of the name of any person intending to make an application, and that it did not give him a right to have an application which he should afterwards present to the Board determined in any particular manner. He was to make his application to the Board, and bring his case within the law as it stood at the time when he came before the Board. Sect. 26 enacts that, "All lands not included in any of the foregoing regulations shall be open for sale as rural land at the fixed price of 20*s.* per acre: provided always, that if at any time the superintendent and provincial council of the said province shall recommend the Governor to raise such price, then it shall be lawful for the Governor in Council, if he shall see fit, to raise such price in accordance with such recommendation." Now, by virtue of the 12th and 26th sections put together, it is contended that when the applicant entered his name in the book as a person desiring to make an application, he obtained a vested right to have his case heard and determined, and to have the land at the price fixed by the Government at the time when he entered his name in the book as an intending applicant, and not at the price fixed by Government at the time when the application was made at the sitting of the Board. It appears, then, that on the 7th of July, 1873, Mr. *Macpherson* entered Mr. *Bell's* name in the book of applications. He says that on the same day he lodged applications. On Tuesday, the 8th, the Land Board sat. They did not arrive at his turn to make the applications. That meeting was adjourned, and at the time of that adjournment the application of Mr. *Bell* had not been reached. The Board sat again on the 9th, and on that day they again adjourned before the application of Mr. *Bell* had been reached. In the meantime, viz. on the 9th of July, 1873, an order had been made by the Governor in Council, according to the provisions of the Act, that the price of land should be raised from £1 an acre to £3 an acre; and on that same 9th of July on which the Board sat it was publicly announced by Mr. *Baker*, the inspector of surveys, and the chief commissioner of the Board, that the Government had made that order, and that the price of lands had been raised from £1 to £3 an acre. Mr. *Baker* says, "That previous to the granting of any of the said applications, to wit, on the 9th day of July, 1873, I, this deponent, produced and read publicly, in the hearing of all persons present at the meeting of the Waste Lands Board, and, I verily believe, in the hearing of the said *William Macpherson*, a telegram from his Honour the superintendent of the province of *Otago*, to the Receiver of the Land Revenue, announcing that by an order in Council the price of land had been raised to the sum of £3 per acre." Mr. *Bell* did not present his application on that

J. C.
1876
BELL
v.
RECEIVER OF
LAND
REVENUE OF
SOUTHLAND.

day, because, according to the order in which his name appeared in the application book, his turn had not arrived. He received notice on the 9th that the price of lands had been raised from £1 per acre to £3 per acre. Having had that notice on the 9th, he at the sitting of the Board on the 10th, when they reached his turn, presented his application to the Board for the first time, and they then determined that he was entitled to purchase the land. No price was fixed in his written application; no price appears to have been specified by the Board. They granted his application, and in effect said, You are entitled to have these lands at the price which has been fixed by Government. Notwithstanding the price was £1 an acre when he entered his name in the book as intending to make an application, he had been informed on the 9th that the price had been altered, and he presented his application to the Board after that notice. It appears to their Lordships that the grant of the application was merely the grant of an application at the price which had then been fixed by Government, namely, at £3 per acre; and that the Appellant, Mr. *Bell* had no right to have his rule *nisi* for a mandamus made absolute to command the Receiver of Land Revenue of the district of *Southland* to receive payment at the rate of £1 per acre.

Under these circumstances, their Lordships are of opinion that the decision of the Court of Appeal was correct, and they will humbly recommend Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Townley, Gard, & Corbin.*
Solicitor for the Respondent: *Adam Burn.*

[HOUSE OF LORDS.]

JOHN ANDERSON . . . . APPELLANT;

AND

JAMES FARQUHAR MORICE . . . . . RESPONDENT.

ET E CONTRÀ.

H. L. (E.)
1876
June 26, 29;
July 3, 27.

4 Asp Cas
19/19
6 QBD
54-57
9 QBD
720-2

"Cargo"—Insurance—Insurable Interest—Property passed—Costs.

The purchaser of a "cargo" of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a sum certain "per cwt., cost and freight" has no insurable interest in the purchase (*diss.* Lord *O'Hagan* and Lord *Selborne*), so that should the rice put on board be lost before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel.

A. was a merchant in *London*, he entered into a contract for the purchase of rice. The contract consisted of a bought note, which was in the following terms: "Bought for the account of *A.*, of *B. S. & Co.*, the cargo of new crop *Rangoon* rice, per *Sunbeam*, 707 tons register, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by sellers' draft on purchaser at six months sight, with documents attached." *A.* insured the cargo "at and from *Rangoon*." The ship arrived at *Rangoon* in due time. The loading, by bags, of the rice, was rapidly proceeded with; by far the larger portion of the cargo was on board, the remaining bags of rice being in lighters alongside, when the vessel, unexpectedly, sank. The captain afterwards signed and delivered bills of lading, and the purchaser then accepted the seller's drafts, which were duly honoured. In an action as for a total loss, the Court of Common Pleas held that *A.* was entitled to recover. The Exchequer Chamber (*diss. Quain*, J.) reversed this decision on the ground that *A.* had no insurable interest when the loss occurred. On appeal to this House, the Lords were equally divided, and so the judgment of the Exchequer Chamber stood affirmed. No costs were given on the affirmance.

The jury had found, in favour of *A.*, that there was a loss by the perils insured against. This finding was adopted in both Courts. On appeal that decision was affirmed with costs.

THIS was an appeal against a decision of the Court of Exchequer Chamber, which, by a majority of five Judges to one, had reversed a previous decision given unanimously by three Judges in the Court of Common Pleas.

The action was brought to recover as for a total loss on a policy of insurance effected on rice in the ship *Sunbeam*, at and from *Rangoon* to any port in the *United Kingdom*. Policy valued at £5500.

H. L. (E.)
1876
ANDERSON
v.
MORICE.

The first count of the declaration was on the policy. There were also the common money counts. Pleas: 1, denial of the insurance; 2, that the rice was not loaded on board; 3, denial of plaintiff's interest; 4, unseaworthiness; 5, denial of the loss by perils insured against. As to the money counts, payment into Court. Issue.

The cause was tried in *London,* at the sittings after Hilary Term, 1873, before Mr. Justice *Brett.*

The Plaintiff was a merchant in *London,* the Defendant an underwriter at *Lloyd's.* On the 21st of February, 1871, Mr. *Anderson* had a dealing with *Barradaile, Schiller, & Co.,* respecting a cargo of rice, and the following note was then executed:—

Post 722

> "Bought for account of Messrs. *John Anderson & Co.,* of Messrs. *Barradaile, Schiller, & Co..* the cargo of new crop *Rangoon* rice, per *Sunbeam,* 710 register, No. 1254 in Veritas, at nine shillings and one penny halfpenny (9*s.* 1½*d.*) per cwt. cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at *Rangoon* before April, 1871. Payment by sellers' draft on purchaser at 6 months sight, with documents attached. Brokerage ½ per cent.
>
> "*Thomas Gray & Walker.*"

The *Sunbeam* arrived at *Rangoon* on the 3rd of March, and began loading on the 6th. On the 7th of March the agents of the vendors sent to *Anderson* a letter stating that they had received a telegram from their principals at *Calcutta* in these words "*Sunbeam—Rangoon*—advise *Anderson*—Insurance."

On the 3rd of February the insurance had already been effected, as "at and from *Rangoon* to any port or place of discharge in the *United Kingdom* or Continent by the *Sunbeam,* warranted to sail from *Rangoon* on or before the 1st of April, upon any kind of goods and merchandise; beginning the adventure upon the said goods, &c., from the loading thereof aboard the said ship, &c., and shall so continue and endure during her abode there, &c.. And farther, until the said ship, with all goods, &c., shall be arrived as above, &c., the said ship and goods, &c., are and shall be valued at £5500 (part of £6000) on rice as interest may appear. Amount of invoice and 15*s.* to be deemed the value average payable on every

500 bags. Assurance at and after the rate of nine guineas per cent.; return of 40s. on vessel's discharge in *United Kingdom.*"

The vessel did not belong to any of the contracting parties, but was at the time the property of an American firm, and had been chartered by Messrs. *Gerber*, of *Rangoon*, to take a cargo of rice from that place to the *United Kingdom.* Messrs. *Barradaile* had purchased their interest. In March, 1869, the *Sunbeam*, being at *New York*, was recaulked and remetalled in dry dock (though not then surveyed), and was reclassed in the French Veritas for three years from that time. It proceeded on a voyage to the *Chincha Islands*, and sailed in September, 1869, with guano for *London*, where it arrived in June, 1870. It then proceeded to *Cardiff*, and took in a cargo of coals for *Point de Galle.* It duly arrived there and delivered the coals. It was then chartered by *Gerber & Co.*, of *Rangoon*, to load a cargo of rice there for a port in the *United Kingdom* or the Continent, the charter providing a gratuity of £20 to the captain in case he completed the loading of the rice before the 1st of April. The *Sunbeam* left *Point de Galle* in ballast, and arrived at *Rangoon* on the 3rd of March, 1871. The weather was very dry and hot, and the ship, being in ballast, was very light, and the upper sides were out of the water.

On arriving at *Rangoon* the *Sunbeam* anchored at the usual anchorage in the *Pegu* river, where that stream joins the *Rangoon* river, about five miles below the town of *Rangoon*, and about thirty miles from the sea. The *Pegu* has a very rapid rise and fall of the tide. The sides and bottom of the river are of soft mud to the depth of several feet, and the depth of the stream at low water is twenty-six or twenty-seven feet. The *Sunbeam* was anchored by the bows with its starboard and port anchors, each with thirty fathoms of chains, the one being up and the other down the stream, at a distance of sixty fathoms; the vessel swung with the tide, and rode by one or the other anchor as the tide ebbed and flowed.

On the 6th of March the *Sunbeam* began to receive the rice on board. The loading went on rapidly, and on the 30th of March, the ship had received the greatest part of the cargo; 8878 bags of rice had been loaded, the others were in lighters alongside. Up to six o'clock in the afternoon of the 30th of March nothing wrong was suspected, but something then was observed; the trim of the vessel was sought to be altered, the pumps were set to work, and it was found that there were six feet of water in the hold. Notwithstanding great exertions at the pumps, the water had by ten o'clock, P.M., increased to twelve feet. The water kept gaining on the pumps, and between eight and nine on the morning of the 31st of March the ship and cargo sank and became a total loss.

On the 3rd of April, 1871, the captain signed bills of lading in respect of the rice which had been shipped on board. The bills of lading were in the following terms:—"Shipped in good order and condition by *Gerber, Christian, & Co.*, in and upon the good ship called the *Sunbeam*, whereof *J. H. Bennett* is master, for the present voyage, bound for, &c., 8878 bags containing 28,841 baskets new *Rangoon* cargo rice, being marked and numbered as in the margin, and are to be delivered in like good order and condition at the port as ordered, at *Falmouth* or *Cork* (the act of God, the Queen's enemies, fire, and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever always excepted), unto order, freight for the said goods at the rate of £3. 15*s.* 0*d.* (three pounds and fifteen shillings) sterling per ton of 20 cwt. nett delivered. In witness whereof, &c. Weight and contents unknown. *J. H. Bennett.*" Messrs. *Barradaile & Co.* drew bills for the price of the rice mentioned in these bills of lading, and these bills of exchange were accepted and paid by the Plaintiff *Anderson* after he had notice of the sinking of the vessel and the rice.

At the trial there was contradictory evidence as to the loss having occurred from the unseaworthiness of the vessel, or from the perils insured against, upon which question the jury ultimately found a verdict for the Plaintiff. Another point raised by the Defendant's counsel was that, under the circumstances existing here, the Plaintiff had no insurable interest in the cargo. The verdict was entered for the Plaintiff subject to leave reserved to move on these points. A rule was accordingly obtained, but, on the 2nd of November, 1874, was discharged (1). The case was taken by appeal before the Exchequer Chamber, where, on the 26th of June, 1875, judgment was given unanimously that there was evidence to sustain the verdict; that the loss was occasioned

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(1) Law Rep. 10 C. P. 58.

H. L. (E.)
1876
ANDERSON
v.
MORICE.

by perils insured against, and that there was not evidence to shew that the ship was unseaworthy, but (*diss.* Mr. Justice *Quain*) that the Plaintiff had no insurable interest in the rice at the time of the loss, and therefore the judgment of the Court of Common Pleas was reversed (1).

This appeal was then brought.

There was also a cross appeal. It was brought by *Morice* against the decision of the Exchequer Chamber so far as it had affirmed the judgment of the Common Pleas, sustaining the finding of the jury that the loss had happened from the perils insured against.

Sir *H. James*, Q.C., and Mr. *Watkin Williams*, Q.C. (Mr. *J. C. Mathew* was with them), for the Appellant:—

Immediately upon the execution of the contract for the purchase of the rice, the Appellant (the Plaintiff below) obtained an insurable interest in it. The contract gave him that interest (2), and the conduct of the parties shewed that in their understanding the rice was his property. On the construction of the contract the whole case depends. The words of the contract shewed that the vendor had no other duty to perform than to deliver the rice, and that all the responsibility of insuring it rested with the purchaser. The risk was therefore his. Even the policy described the risk as beginning with the loading of the cargo. From the moment that any part of it came into his possession, the appropriation of it by the vendor was complete; from the moment the vendee received it on board his adoption of that appropriation was declared, and his risk began. Till it was delivered, it might possibly be said that it still remained the property of the vendor, but the very instant that any part of it was put on board Mr. *Anderson's* ship, that instant the delivery of that part was complete, and the property in it vested in him. He might have made a contract over, and would have been liable upon it. If the part put on board had been destroyed by fire, the loss would have been that of the purchaser. And if the vendors had, after that, brought a farther quantity to be put on board, so as to complete the cargo, the master must have accepted it. The ship, for this purpose, was *Anderson's;* it was the warehouse within which his goods (the rice) were by him appointed to be stored, and his hiring of the vessel was the same as would have been his hiring of a warehouse on shore for the purpose of receiving his goods. It was the same thing whether the goods were to be delivered to the purchaser himself, or to a wharfinger whom the purchaser had specially appointed to receive them. It need not be shewn that the purchaser was bound, from the first, to take the goods; if he had the right to take them, and by his conduct shewed that he had exercised that right, they became his. He could exercise his right of option at any time, and he might exercise it as each portion came on board. The vendors could not have entered his ship to take away any portion of the delivered cargo. It made no difference that his payment for these goods was not to be made till the bills of lading and shipping documents were delivered; that was a mere delay in the time of making the payment, which did not affect his right or his liability. Payment for goods is not the only test of the goods having become the property of a purchaser. The only thing that could have released him from liability would have been the non-performance of the contract on the part of the vendors, and in that event he might have had an option to reject what had been sent, but the delivery of each bag of rice sent was, so far, a part performance of the contract by the vendor, and the acceptance of each bag of rice was, so far, an exercise of *Anderson's* option. The whole could not be put on board at once, and what was put on board and received on board became his property from that moment.

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(1) Law Rep. 10 C. P. 609.

(2) *Phillips* on Insurance, c. iii. 178.

The insurance attached from the arrival of the *Sunbeam* in the river at *Rangoon*, and the risk then began.

Such was clearly the intention of the parties on entering into the contract, and the Appellant shewed the *bona fides* of that intention by at once insuring the rice. If the purchaser had a right to say to the seller, "I accept the rice sent me," he had equally the right to say to the underwriter, "I have accepted it, and it is my property, to cover which the policy has been executed." The insurance attached the moment the goods were on board; there was no waiting till the ship had got out to sea on the voyage. The words of the policy, "at *Rangoon*," shew that it was to attach during the loading on board.

Even though the whole property has not been actually delivered, the risk of it may be that of the purchaser: *Martineau* v. *Kitching* (1).

This was not the purchase of an ascertained chattel, but of a cargo of rice, of rice to be delivered in bags, and each delivery of each bag was therefore, so far, a fulfilment of the contract, and the interest attached as that was done: *Arnould* on Marine Insurance (2); *Turley* v. *Bates* (3).

Sparkes v. *Marshall* (4), *Castle* v. *Playford* (5), *Joyce* v. *Swann* (6), *Langton* v. *Higgins* (7), *Seagrave* v. *The Union Marine Insurance Co.* (8), *Aldridge* v. *Johnson* (9), *Ebsworth* v. *The Alliance Marine Insurance Co.* (10), *Byrne* v. *Schiller* (11), *Hicks* v. *Shield* (12), *Mansfield* v. *Maitland* (13), *Lucena* v. *Craufurd* (14), *Hagedorn* v. *Oliverson* (15), *Cory* v. *Patton* (16), and *Carter* v. *Scargill* (17), were also cited and commented on.

Mr. *Butt*, Q.C., and Mr. *Cohen*, Q.C., for the Respondent:—

Insurance is a contract for indemnity—nothing more, and unless a person has an interest against the loss of which he requires to be indemnified, he cannot insure. Here there was no such risk. The loss, if any, occurred at the moment the ship sank. Could it be said that the Appellant had then lost anything? Certainly not. He had then no property in the goods—none had passed to him—the property was in the vendors; they had undertaken to deliver a "cargo" of rice. At the moment the ship went down, no cargo had been delivered—the vendors were only in the course of performing their contract, and, till they had performed it, the rice was at their risk. There was an act to be done by the vendors, and till done, there had been no performance of the contract, and no property passed: *Blackburn*, Contracts of Sale (18).

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(1) Law Rep. 7 Q. B. 436.
(2) C. x. p. 229, *et seq.*
(3) 2 H. & C. 200.
(4) 2 Bing. N. C. 761.
(5) Law Rep. 7 Ex. 98.
(6) 17 C. B. (N.S.) 84.
(7) 4 H. & N. 402.
(8) Law Rep. 1 C. P. 305.
(9) 7 El. & Bl. 885 3 Jur N.S. 915
(10) Law Rep. 8 C. P. 596.
(11) Law Rep. 6 Ex. 20–319. See *Allison* v. *Bristol Marine Insurance Company*, 1 App. Cas. 209.
(12) 7 El. & Bl. 633. 3 Jur N.S. 715.
(13) 4 B. & A. 582.
(14) 3 B. & P. 75; 2 N. R. 269. See also 1 Taunt. 325.
(15) 2 M. & S. 485.
(16) Law Rep. 7 Q. B. 304.
(17) Law Rep. 10 Q. B. 564.
(18) Page 151.

The vesting of the property is a question of intention, and the contract does not shew that there was any intention that the property should pass until the delivery of the cargo had been completed, nor perhaps, indeed, until the bill of lading and the shipping documents had been delivered, and the drafts in payment had been accepted. Now if only a few bags had been put on board, it could not be contended that the purchaser would have been bound to accept them as delivery of the cargo, and no difference in principle was made by the fact that instead of a few bags a great many bags of rice had been put on board. The Plaintiff was entitled to exercise an option as to what was sent in performance of the contract, and to exercise it up to the last moment of the delivery of a full cargo. But if so, till that full cargo had been delivered, and had been accepted, the property was not his, but that of the vendor, and was consequently not at the purchaser's risk: *Appleby* v. *Myers* (1). The case of *Gilmour* v. *Supple* (2) had been relied on in the Court below, but that was not a case of insurance, but merely one of a contest between vendor and vendee, in which the rights of third persons were not affected.

The delivery here could not be said to be made into the ship of the Appellant: it was not his, he had not chartered it; he arranged with the vendors of the rice that they should put the rice on board that ship, and he was to pay a gross sum to the vendors of the rice, which was to cover the value of the rice and the sum which the vendors were to pay for the freight. The property could not be said to be delivered to him till it was delivered into his ship. There was a broad distinction between delivery of goods into his own ship and delivery of them into a ship merely chartered by another person for a voyage, and the freight for which was to be paid as part of the gross purchase-money of the cargo. That distinction was made clear by all the cases which related to stoppage *in transitu*, where delivery into a chartered ship, or to a railway company was not, as of course, deemed delivery to the vendee himself, but all the circumstances of the delivery were required to be considered. Putting the rice on board a ship which was at the time more the ship of the vendors than it was the ship of the Plaintiff, was not like putting the oil

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(1) Law Rep. 2 C. P. 651.

(2) 11 Moo. P. C. 551.

H. L. (E.)
1876
ANDERSON
v.
MORICE.

agreed to be sold, into bottles furnished for that purpose by the purchaser himself, as in the case of *Langton* v. *Higgins* (1), and did not constitute an appropriation of the rice to *Anderson.* How, then, if the property in the rice did not pass to the Plaintiff, could he be said to have an insurable interest in it. The rice might be his by contract, so far as he and the vendors were concerned, so as to enable him to sue on the contract, but their mutual relation in that respect would not be sufficient to affect the rights and liabilities of third persons. The property here did not pass; the bill of lading had not been delivered, but was to be handed over at a future time. Before that time arrived, and when no property was vested in him, and no risk cast upon him, the Plaintiff insured the cargo. But if he had no right in the cargo, and no interest in it, and no risk attached to it, the mere act of insurance could not give him one. Reliance was placed on the words of the contract; it was assumed that, without express words to pass the property it would pass and be at the risk of the buyer, on account of the implied effect of some words in the contract. Thus it was supposed that the words "bought" and "cost and freight" were sufficient to shew that the whole property in the subject-matter of the contract was in the buyer; but that was not so. The word "bought" was merely a common phrase used to shew that a dealing with respect to purchase and sale had taken place, but it did not shew that there had been a complete sale sufficient to pass the property; and the other words merely described what would be the amount of liability, and in what way that was to be measured, when the contract was actually carried into effect. But it is essential to shew that the insured had actually an interest at risk: *Phillips* on Insurance (2): *Warder* v. *Horton* (3). The risk went with the property. The act of insuring, immediately after the contract was made, had no effect whatever in shewing that that contract was to be taken as executed. The vendor's risk never began until after the day when the cargo which was the specific subject of purchase had been delivered, but none was ever delivered, for the ship sank before the delivery was complete. The words of the policy, therefore,

(1) 4 H. & N. 402.

(2) Chap. iii. sects. 172, 175, 181, 185.

(3) 4 Binney, Pensylv. Rep. 529.

had here no application favourable to the Plaintiff, for they related not to a liability for part of a cargo, but for a cargo—a complete cargo. In *Sparkes* v. *Marshall* (1) and *Joyce* v. *Swann* (2) the Court thought that the property had passed, but as that was the very question here, those cases were inapplicable to the present. The principle by which all cases of this kind must be decided was laid down in *Cutter* v. *Powell* (3), and was fully elucidated in the learned notes to that case printed in *Smith's* Leading Cases (4). When this ship went down there was no liability on the part of the Plaintiff to pay for anything. If so, there was no interest in him of an insurable nature.

Sir *H. James* replied.

LORD CHELMSFORD :—

My Lords, the question to be determined upon this appeal is one of some difficulty, and it has given rise to a great diversity of judicial opinion. It may be thus shortly stated: whether the Appellant under a contract for the purchase of a cargo of rice, to be shipped in a vessel called the *Sunbeam*, had any property in the rice, or had incurred any risk in respect of it, so as to give him an insurable interest at the time of the total loss of the vessel and cargo?

The contract for the purchase of the rice is in following terms :—[His Lordship read it, see *ante*, p. 714.]

If the intention of the parties is to be collected from the written contract alone, as payment was to be made only on the completion of the cargo, according to the case of *Appleby* v. *Myers* (5) until the cargo was completely made up no interest in it passed to the purchaser. But although the purchaser of a cargo may have no interest in it until a certain event, as for instance until delivery, he may, if he pleases, expressly take upon himself all risks and dangers of the voyage, as in *Castle* v. *Playford* (6), although without a stipulation to this effect he would not be affected by anything which might happen to the cargo in its transit to him.

In the present case it is contended that, either under the contract itself, the Appellant's risk began as soon as any rice was shipped on board the *Sunbeam*, or that the act of effecting an insurance on the rice by the Appellant was an agreement on his part to undertake the risk. Assuming that the intention of the parties may be implied from their acts, and so become a term in the contract, the acts ought to be such as to manifest that intention without ambiguity. The acts relied upon in this case are a notice from the vendors to the purchaser to effect an insurance on the rice in the *Sunbeam*, and a policy of insurance effected by the purchaser accordingly, describing the adventure as "beginning upon the goods and merchandises from the loading thereof abroad the ship, and to continue and endure during her abode at *Rangoon*, &c."

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(1) 2 Bing. N. C. 761.
(2) 17 C. B. (N.S.) 84.
(3) 6 T. R. 320.
(4) Vol. ii. p. 1.
(5) Law Rep. 2 C. P. 651.
(6) Law Rep. 7 Ex. 98.

It seems to me to be clear that unless a change was produced in his rights and liabilities under the contract, by his undertaking the insurance, *Anderson* would have had no interest in the rice until a complete cargo had been shipped. But although this was his position in relation to the contract itself, he had a contingent benefit which might accrue to him from the completion of the cargo on board the *Sunbeam*, and its safe delivery. This contingent benefit was one on expected profits, and although it would not be protected by an insurance on the rice, *Lucena* v. *Crauford* (1), yet *Anderson* having that contingent interest in the safety of the cargo, might not be disposed to take upon himself an insurance against its loss, more especially as he would have an interest in the rice itself at *Rangoon*, as soon as the cargo should be completed.

Did this insurance throw the risk of the loss of the rice upon him? Did he, by undertaking it, impliedly agree with the vendors that if the rice was destroyed after any part had been shipped on board the *Sunbeam* the loss should be his? Did this act change the nature of the contract, the stipulations of which, enabling the vendors to take the bill of lading in their own name, and to send it forward with the draft, being *primâ facie* (though not conclusive) evidence of the interest and property remaining in them? What is the nature of the risk which *Anderson* is supposed to have undertaken? In the words of Mr. Justice *Blackburn* in *Castle* v.

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(1) 2 B. & P. N. R. 269.

Playford (1), it was this:—"If the property perishes by dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not." If this really was his undertaking every bag of rice the moment it was shipped on board the *Sunbeam* was at his risk, and the loss of it must have fallen upon him. But the Court of Common Pleas held that as *Anderson* would not, if the ship had sailed and arrived with what was on board of it when it sank, have been obliged to accept what was on board, he was not bound to pay for the rice on board, lost at the time of the sinking. From which it would seem to follow that *Anderson* was not exposed to any risk of loss before a complete cargo had been shipped in the *Sunbeam*.

There being, therefore, conflicting evidence of intention as to the interest in the rice passing to the purchaser, or remaining in the vendors, the effect of the written contract being that the interest was to continue in the vendors till the completion of the cargo, and the consent of the purchaser to insure not shifting the property during the loading and before the cargo was complete, and being at the utmost an uncertain indication of his intention to assume the risk, I think we ought not to look out of the contract, but to determine the rights and liabilities of the parties by it alone.

It is not disputed that by the terms of the contract *Anderson* was not bound to take less than a complete cargo of rice, and that he had an option either to accept or reject a part cargo. If he had exercised this option by accepting what was on board before the *Sunbeam* sank, as a fulfilment of the contract on the part of the vendors, he would have had an insurable interest in the rice at the time of the loss. The Judges in the Court of Common Pleas thought the property had not passed out of the vendors at this time, but they were of opinion "that there was such an appropriation of the rice on board to the contract, as to prevent the sellers from withdrawing that rice without the consent of the buyers;"(3) thus apparently fixing the buyers with the risk of the rice from time to time as it was put on board. Upon this Mr. Justice *Blackburn*, in his judgment in the Exchequer Chamber, observes (2), "If we could see anything to indicate an intention that as each bag

(1) Law Rep. 7 Ex. 98.

(2) Law Rep. 10 C. P. at p. 620.

(3) L R 10 C P at p 71.

was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent, but we cannot find anything to this effect."

Now, an intention that each bag of rice shipped should be at the risk of the purchaser is necessary to be established as a foundation for the argument maintained by the learned counsel for the Appellant, that if part of the rice had been shipped, and had been damaged while on board, the vendor might, without removing it, have gone on loading the rice until a full cargo had been put on board, and have delivered it to the purchaser, who would have had no option, but must have accepted it as a faithful performance of the contract. Sir Henry *James* went farther than this, and argued that even if the part of the cargo shipped had been totally destroyed by fire, and the vendors had come with a farther quantity of rice to be shipped, the master must have taken it in, and if the *Sunbeam* had afterwards arrived with a quantity of rice, which, together with that destroyed, would have amounted to a full cargo, the purchaser could not have refused to accept it. This rather bold proposition requires for its support (as already stated) that it should first be established that each bag of rice as it was shipped on board was appropriated to the purchaser, and was at his risk.

It was said that Baron *Bramwell*, in the judgment of himself and his brother Barons, agrees that if the rice on board was damaged the vendors might go on and complete the cargo, and maintain that they had fulfilled their contract. But the learned Baron by no means expressed an unhesitating assent to the proposition, for, after observing that the rice was not to be the purchaser's property or at his risk till completion of the cargo, he went on to say (1), " Save possibly, as was suggested, that if any of the rice during the loading, and after it was on board, had been damaged, the sellers might complete the cargo, and insist that they had fulfilled their contract by shipping merchantable rice."

Assuming that the rice was not the purchaser's property, nor at his risk, as Baron *Bramwell* thought, I cannot agree that in the circumstances supposed there could possibly be a performance of the contract. The purchaser was entitled to a full cargo of merchantable rice, and was not bound to accept less than a full cargo. If so, how could he have been compelled to take a cargo which consisted only partly of merchantable rice, or part of a cargo the other part of which had been destroyed?

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(1) Law Rep. 10 C. P. at p. 623.

But even if the purchaser might, in the supposed case, have been placed in the position of being forced to accept a partly damaged or partially destroyed cargo, this could only be after the vendors had from first to last put on board a quantity of rice which, with reference to the number of bags actually shipped, would have amounted to a full cargo. When the loss occurred, this had not been done, and the purchaser had not exercised his option to accept the incomplete cargo. The learned counsel for the Appellant argued, that after the *Sunbeam* sank with a deficient cargo, the purchaser had a right to exercise his option and to accept the rice at the bottom of the river, in fulfilment of the contract. And the Court of Common Pleas held (1) that although the Plaintiff had an option, which existed at the time of the loss, of rejecting the rice, on the ground that a full cargo had not been shipped, he "was entitled as against the Defendant (the underwriter) to decline to exercise that option, and to insist that the contract of purchase and sale was fulfilled by the loading, on behalf of the vendors, on board the *Sunbeam*, of the rice which was on board when the ship foundered; and that consequently the property in such rice was in him, the Plaintiff, at the time of the loss."

But it appears to me that the right to exercise the option must be distinguished with relation to different parties. As between the purchaser and vendors there was nothing to prevent the purchaser, if he chose to do so extraordinary a thing, to take to the perished rice, and pay the invoice price of it. But the case is one between the purchaser and the underwriters. The purchaser was entitled to a cargo of rice shipped on board the *Sunbeam;* the option which he was entitled to exercise related to a cargo on board that vessel, and no other. Both vessel and cargo were utterly lost; what subject was in existence upon which an option could be exercised?

It was argued, that if a purchaser of goods had an option to accept the delivery of them, he might exercise such option after

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(1) Law Rep. 10 C. P. 75.

H. L. (E.)
1876
ANDERSON
v.
MORICE.

the goods had been lost. He might certainly, if the property in the goods had been in him, for then the right would have been, not a right to accept what had already become his, but to refuse them as not fulfilling the contract. That was the case of *Sparkes* v. *Marshall* (1), cited as an authority in favour of the Appellant, where it was held that a purchaser having a right of option to accept or reject goods, might exercise that option against underwriters, after the loss of the goods *in transitu.* That case turned entirely on the fact of the oats, the subject of the contract, having been appropriated to the Plaintiff, and the interest in them being vested in him at the time of the loss. The case is therefore clearly distinguishable from the present, where the purchaser, having an unexercised right of option, before the loss, as to the cargo of rice, wherein no interest had passed to him, took upon himself to accept and pay for the goods.

After the loss the purchaser was not bound to pay for the rice, the vendors could not have insisted upon payment. If there had been no insurance, it cannot be supposed that the purchaser would have taken to and paid for the rice at the bottom of the river. The payment was entirely voluntary, and instead of being the exercise of a *bonâ fide* option by the purchaser, was only made by him, and accepted by the vendors, with the view of relieving themselves and throwing the loss upon the underwriters.

I think that the judgment of the Exchequer Chamber is right, and that it ought to be affirmed.

LORD HATHERLEY:—

My Lords, I feel that this is a case offering many points of difficulty, and, as we have seen already in the Courts below, it is one upon which considerable differences of opinion may exist upon the documents and the evidence which have been placed before us for our decision. The documents are scanty, and we are driven to draw such inferences as we best may from the exact wording of the language of the contract, and from the transactions which took place at the time it was made, as bearing upon the question of the risk of the assured in those goods, which were the subject of the policy, when the property was destroyed by an accident. It was such an accident as would clearly be within the terms of the policy if we could hold that the assured had such an interest as he could insure, and was subject to such a loss that required him to be indemnified by virtue of his contract of insurance.

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(1) 2 Bing. N. C. 761.

Now, the original document itself, by which the purchase of the rice was made, appears to me, when it stands alone, to be very plain and clear in its construction. The rice bought, the subject-matter of the contract, was "the cargo of new crop *Rangoon* rice per *Sunbeam*." The *Sunbeam* is described by a foreign register; the ship is said to be No. 1254 in a book equivalent to certain books which are kept here with reference to the classification of ships. It is described as "700 tons register, No. 1254, in Veritas," and the price of the rice is fixed at so much "per cwt. cost and freight." The freight appears to be included with the price. And it is stated that it is "expected to be March shipment, but the contract is to be void should vessel not arrive at *Rangoon* before April, 1871." Then the payment is to be made "by sellers' draft on purchasers at six months' sight, with documents attached."

The Court below has held that on the face of that document, in the first place, it would appear to have been intended by both parties that the subject-matter of the contract should be a full and complete cargo of this ship *Sunbeam*, whatever that fit and proper cargo might be; and, secondly, that, so far as the contract itself is concerned, the provision that the payment was to be made "by sellers' draft on purchasers at six months' sight with documents attached" indicated that the property should not pass from the vendors to the purchasers, at least until the vendors were in a condition to attach such documents, which again would lead to the conclusion that the property was not intended to pass until a complete cargo had been supplied to the vessel, and the bill of lading, one of the documents in question, could be attached.

That being the state of things, and the question arising as to who was to be at the risk during the loading, the question of whose the risk was will not be determined solely by the question of property. That is shewn by many authorities, to which copious reference has been made during the argument. It is perfectly conceivable—indeed, in many cases it has been so as a matter of

H. L. (E.)
1876
ANDERSON
v.
MORICE.

fact—that a person, selling some goods at a distant place to a person living in this country, may say "I am perfectly willing to sell you these goods. I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage; and although you will not be expected to pay for the goods and acquire the property until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit, and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain." Although nothing is distinctly said to that effect in this contract, there are other matters in evidence which might be sufficient to imply that it was part of the arrangement (and so, indeed, I think the Court below, the Court from which this appeal is brought, may be said to have held) that when all was complete, when the cargo was complete, when the documents were obtained which were to be attached to the bills that were to be drawn, when all that was done, although it might still be held that the property had not passed until the purchaser was in possession of these bills and these documents, yet at the same time the intermediate risk—the intermediate loss if such there should be—should not be at the vendor's risk, but at the purchaser's. And that may be brought before the Court by evidence collateral to the contract.

In the present case the evidence stands thus:—As a matter of fact it appears that the purchaser, *Anderson*, the Appellant, on the 3rd of February, immediately after the contract, which was dated the 2nd of February, in *London*, instructed the insurance brokers to insure a "cargo of rice per *Sunbeam*, 1254 Veritas, *Rangoon* to the *United Kingdom*," which evidently refers to the contract of which I have been speaking. That is answered by the brokers stating that they have acted upon that authority. After that there arrives a letter from Messrs. *Thomas Gray & Walker*, who had negotiated the contract in *London*, to *Anderson*, informing him of a telegraphic message as follows:—"We beg to advise having received the following telegram from *Calcutta*, dated 6th March, *Sunbeam*, *Rangoon*, advise *Anderson*, insurance."

It has been said—and I myself am inclined to take that view also—that from the fact of this message sent to *Anderson* "advise

Anderson, insurance," coupled with the fact that *Anderson* did insure immediately after entering into the contract, and that the vendors did not insure (because both points are of some importance)—from the whole of these circumstances put together it may be inferred that the purchaser was to bear the risk of anything that might occur in the transit of the goods from *Rangoon* to this country. This telegram indicates that the ship *Sunbeam* having arrived at *Rangoon*, the vendors desired to remind *Anderson* of the duty of insurance if he wished to escape from the risk which the vendors considered him bound to undertake. Although, therefore, there is nothing in the contract *per se* which would indicate that *Anderson* was to be at the risk of any intermediate loss of the vessel before being ready to sail, yet putting all these circumstances together,—namely, that he did in fact immediately give directions for insurance, that he received from the vendors this letter and telegraphic message reminding him that he should insure, the vessel having actually arrived at *Rangoon*,—one may infer from all these points put together as matters of evidence, that the engagement was that the vessel on its voyage, and the goods also, were to be at the risk of *Anderson*.

Now comes the question, what was it that was to be at the risk of *Anderson?* I apprehend that what was to be at his risk was what he had purchased. It appears to me that he was to be at the risk of the cargo which was to be sent to him by the *Sunbeam*, and that the property would not pass until that thing was brought into existence which he had bought. Now the thing he had bought was I think confessedly, on the part of the Judges who took the one view or the other of this question in each Court, a whole and complete cargo of rice to be shipped by the *Sunbeam*. The vendors could not have sent him half a cargo; or, if it had been sent, he might have had the option of saying, I will take it; but he had not bought it. He might also say, under my contract if you put half a cargo of rice on board the *Sunbeam*, and bring it here and tender it to me as the cargo, I may take it if I choose to exercise such an option; but I am not bound to take it, and I decline it. Until he had exercised such an option the property had not vested in him. I apprehend that until he had got the thing which was contracted to be sold, namely, a full and complete cargo, he had not got anything that could possibly vest in him, whatever might be said of the whole cargo when completed, although completed in *Rangoon*, and before he received the bills of lading and other documents, together with the drafts which were to be drawn for the price of the goods and the freight.

Then, my Lords, the argument is put thus; it is said, he having this option to accept or not as he pleased, and having the *Sunbeam* at *Rangoon* as a vessel which might be considered in the light of being his own vessel, inasmuch as, under the contract, the freight of that particular vessel, as well as the price of the goods sold, was to be paid by him, it comes to this, that it was as though he had sent the *Sunbeam* to receive the goods, and when each bag of rice was put on board that ship it was on board for his benefit, and was specially appropriated to him as purchaser, and could not have been removed without his consent. The learned Judges in the Court of Common Pleas viewed the matter in this light. In the judgment, from which a passage has been read by my noble and learned friend now on the woolsack, I mean the judgment of Mr. Justice *Blackburn* in the Court of Appeal, the view that when once any particular bag of rice had been put on board the vessel it could not be removed without the consent of *Anderson*, the purchaser, is commented upon. That learned Judge, and those learned Judges who agreed with him, proceed as far as this, that it might well be that the bags of rice placed on board this vessel, when once so placed, could not be removed without the consent of the shipowner or the person with whom the contract had been made for the vessel, that is to say, the charterer; but the Judges below having said it could not be removed without the consent of the buyer, Mr. Justice *Blackburn* makes this remark:—"The Court below say that putting any rice on board the *Sunbeam* was such an appropriation of the rice on board as to prevent the sellers from withdrawing that rice without the consent of the buyer. If we could see anything in the contract to give the buyer a right to object, we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent. But we cannot reason in a circle."

Now, my Lords, I apprehend that you must look to the contract to arrive at a conclusion on this point, and, looking at the contract, I confess I agree with Mr. Justice *Blackburn*. I can find nothing to say that when once 100 bags have been put on board, those 100 bags could not be removed without the vendee's consent. It is easy to suppose circumstances in which this question might have arisen. The vendors of the rice might have had some other vessel to fill in a shorter time than this; this was to be filled by a specified time, and they were put to difficulties about filling it in that time as it was; it might have been otherwise; it might have been that they had ample time to fill this vessel, and that they had not so much time to fill another, and consequently they might have been desirous to transfer some bags of rice from this vessel to the other one, or they might have desired to do so, if any accident had happened to a lighter coming down the river to the other vessel which they were bound to load in a given time. If they were minded to transfer part of the rice on board this vessel to another vessel—always considering such claims as might be set up by the shipowner himself, when the rice had once been put on board the ship, to have the loading completed—subject to such claims, I cannot myself see that the vendee could have had anything to say against their removing that rice, provided always that they filled the *Sunbeam* within the time provided by the contract, and in other respects complied with the terms of the contract. It strikes me that there is nothing upon the face of the contract to say that the contract was not to be performed in any degree piecemeal, or that anything had been bought except a cargo, by which I think was meant a full cargo, of merchantable rice—the *Sunbeam's* cargo—subject, of course, to arrangements between themselves as to what was a proper cargo for the *Sunbeam* as to weight and so forth, all of which would be readily understood by men entering into contracts and dealings of this description.

But, my Lords, it was said with reference to this part of the case—it was rather put as illustrating how far that view would be supposed to carry their argument—but we hold that if so many (say, 100) bags of good merchantable rice were placed on board that vessel in the course of loading, and, before the cargo was completed, those 100 bags had become destroyed by the entrance of sea water or some other accident, a risk of the sea, then the vendor would have fulfilled his contract of supplying the cargo of rice, provided he afterwards added sufficient rice, instead of the bags which had been destroyed, to make up the full cargo. I cannot accede to that proposition in any shape or form; it is certainly putting the case very high—yet I cannot say that I am driven to come to a contrary conclusion by such an argument. It appears to me beyond all doubt that what the vendor had to furnish was a cargo of merchantable rice; and if when the vessel arrived at *Rangoon*, or at any time before the cargo was completed, and before the documents could possibly be obtained, that rice had been utterly destroyed and wasted, I think the vendee would most undoubtedly be in a position to say:—You have not supplied to me that which I bought, namely, a full cargo of merchantable rice; it was not, at the time when the loading of the cargo ceased, a full cargo, and from that time it never has been a full cargo of merchantable rice, and take it I will not—I apprehend he would have been perfectly justified in so saying.

My Lords, if that be so, I am quite unable to see how this rice, supposing the whole cargo of it when completed was to be at the risk of the vendee, can be said to have been at his risk when the thing he bought never had been brought into existence at all. The vessel unfortunately sank before the cargo of rice had ever been completed, and therefore the thing which was to be insured against had never come into existence, and of course the vendee had never acquired an interest in that which had never been in a state in which it could be tendered to him for his acceptance.

But then it is said that he had an option which he might exercise, and that he might say,—Although this rice has been destroyed, although it never left the river of *Rangoon*, but sank to the bottom before the thing I bought was completed, I will exercise my option of taking it now, though the incomplete cargo has been destroyed. I apprehend it is quite impossible to say, and no authority certainly goes anything like the length of saying, that, as against third persons, and merely for the purpose of making those persons liable, the vendee could exercise the option which he had—or which, if the thing in any shape or form had been brought before him, that is to say, if the half cargo had been sent to this country, he might have had—of saying whether he would or would not take it. It is impossible to say that he had vested in him such an interest in that which went to the bottom, and which did so before the actual thing he bought came into existence, that he could exercise his option of taking it so as to throw the loss upon third persons. It would be merely nominally—by a mere passing of pieces of paper—that he could be said to have exercised any option at all about such a subject-matter; and to say that he could do that for the purpose of throwing a loss on the underwriters is not a reasonable argument. It has been said that Mr. Baron *Bramwell* accepted that argument. I do not read his Lordship's observations as leading to that result. I read Mr. Baron *Bramwell's* observations as meeting the argument, if it could have had any force at all, by certain observations of his own. My noble and learned friend now on the woolsack has already shewn that there is not any actual adoption on the part of Mr. Baron *Bramwell* of the argument so suggested.

But one argument on which much stress has been laid is this:—if you once concede, which I am disposed to concede, that there was to be an insurance to cover the risk at some period or other, then looking at the whole transaction and all that has passed in the matter, it is unreasonable to suggest that with regard to the loading of this ship there should be two separate periods of risk to be covered by two different insurances, the risk being of the same character and relating to one and the same ship, and to one and the same subject-matter; and that, therefore, if you suppose that the risk was to be at any time thrown upon the vendee, you must take it that it was not expected by him, or by anybody else, that there should be one risk in the river whilst the process of loading was going forward, and another risk to be incurred when the vessel started on her voyage, and that each of these two risks were to be separately insured for, the one by the vendor and the other by the vendee. Now, my Lords, I apprehend that that argument is one which cannot, with all respect, commend itself to your Lordships. One answer which has been suggested to that argument is that, as regards all the barges bringing the rice intended for the *Sunbeam* down the river to be placed on board that vessel, the difficulty is just as great and involves as unreasonable a supposition as exists with regard to the cargo itself. But, my Lords, I apprehend the true answer to the argument is this—I think both Mr. Justice *Blackburn* and Mr. Baron *Bramwell* mention it—it is that neither party thought of this risk at all. Evidently it did not occur to anybody's mind that there was this danger, in a river like the river at *Rangoon*, in the actual loading of the vessel, and that there was a risk that the vessel might sink before the parties were in a position to say that the purchaser had agreed to take the risk upon himself, because that which he had agreed to insure against was in existence, namely the full cargo. I find in the contract nothing to say that the goods were purchased bag by bag as they were placed in the vessel. I find nothing in the contract, or in the surrounding circumstances, which says that the purchaser intended to take the risk until the thing existed against the loss of which he intended to be insured. Therefore it appears to me that to that argument, namely the argument *ab inconvenienti* as regards such a contract being entered into, the best answer is, that neither of the parties thought of this particular risk—it did not occur to their minds that the particular thing which happened might happen. And that is not an unusual circumstance, as your Lordships are aware, in insurances of this character, for we often find that the very thing which has happened is just the thing which both parties omitted to think of and to provide against—at all events it appears to me, that in this case, provided against it they have not. With regard to the possibility of ratifying the contract, I think the reasons given by Mr. Justice *Blackburn* shew clearly that *Sparkes* v. *Marshall* (1) has no application to this case. That was a case where a man having adopted a contract was called upon by the insurers, for their benefit, to exercise a possible option of saying, I ought to be released from it. That is a very different thing from saying: Not being bound by the contract I will consent to be bound by it for the sake of handing over to the vendor, whom I am not obliged to indemnify in any way, the proceeds of the insurance which I have effected.

(1) 2 Bing. N. C. 761.

I apprehend that the right way of regarding the whole case is this, and that is the way in which the learned counsel for the Respondent concluded his observations: Was there at the time that this accident happened any liability whatsoever on the part of the vendee, whereby he was subjected to loss, against which by the contract of insurance he ought to be indemnified ?" It appears to me to be impossible to say, that when the vessel went to the bottom any action could have been brought, or any proceedings taken against the vendee, in respect of that quantity of bags of rice which had been loaded on board the *Sunbeam*. It is another form of the same proposition to say that he was not insured against the loss of that quantity of bags. With regard to the contract itself, I find extreme difficulty in coming to the conclusion that when a man had purchased a cargo of rice to be shipped per *Sunbeam*, and a fourth part, or a third part only, of the cargo had been placed on board the vessel, and then what was on board had been wholly lost, he was under a liability or engagement which would subject him to loss.

I regret, my Lords, that there should be a difference of opinion in your Lordships' minds, as I know there is from having had the advantage of seeing a judgment of one of my noble and learned friends. I can only say that I do not see my way to hold that the judgment ought to be reversed; on the contrary, I think it should be affirmed by this House.

LORD O'HAGAN:—

My Lords, I concur with my noble and learned friend who first addressed your Lordships that this case is one of great nicety and difficulty; as has been sufficiently manifested by the conflict of judgment in the Courts below, and, I am sorry to add, in your Lordships' House.

We have here an appeal and a cross appeal, the latter, on one point, impeaching the unanimous opinion of all the Judges in the Courts of Common Pleas and the Exchequer Chamber. But although the point on which they all agreed was that to which the great bulk of the evidence at the trial before Mr. Justice *Brett* was addressed, and although it was the subject of elaborate discussion, especially in the Court of Common Pleas, I need not deal with it at any length. It was not formally abandoned at the Bar, but it was lightly touched and scarcely relied on; and I think your Lordships may confidently hold that there was evidence to sustain the verdict, which found that the loss was caused by the perils of the seas. Some such evidence there clearly was, and although the opinion of the learned Judge at the trial, as to the effect of it, does not appear to have harmonised with that of the jury, he properly declined to act on that opinion, as against their finding; and, as I have said, in that proper and constitutional course he has been sustained by all his colleagues. The verdict, therefore, upon the issues submitted to the jury, must be maintained; and I refer to it even thus briefly only for the purpose of pointing to the fact, as bearing more or less on the matters really in controversy, that the original resistance to the Plaintiff's claim was chiefly based, so far as I can judge from the documents, not on a challenge of his insurable interest, but on the denial that his loss had been caused by the means which must now be taken, conclusively, to have produced it.

Passing on to the questions which are still open, and which have been argued, on both sides, with conspicuous ability, I note that they really divide themselves into two. First, had the Plaintiff any property in the rice which was put aboard the *Sunbeam*, and was lost by the perils against which the insurance was designed to guard? And, next, whether he had or had not—had he such an interest in the adventure, because it was at his risk, that he could validly insure?

On the first point, I incline to agree with the Court of Common Pleas, that the rice which was actually put on board was so appropriated to the purchaser, regard being had to the terms of the contract and the circumstances of the case, as to give him, at least, the option of retaining it, and to take from the vendors the power of removing it without his permission or against his will. The contract of the 2nd of February, 1871, provided for the sale of "the cargo of new crop *Rangoon* rice," without farther specifying its quantity or quality, but describing it as to come by a named vessel, of a certain tonnage, and of a particular number, and to arrive at a specified place, before an appointed day. The bought note made the purchaser liable for a certain sum "per

H. L. (E.)
1876
ANDERSON
v.
MORICE.

cwt, cost and freight," so that the Plaintiff had bargained to receive, in a vessel which did not belong to him or to the seller, but which was hired for him, and for the time was dedicated to his service, and so, in a sense, was temporarily his own, a cargo, the amount of which was to be ascertained not by prior agreement, but by the capacity of the vessel, and subsequently the ascertainment of the weight. The arrival at *Rangoon* took place before the period fixed for it; and the loading of the cargo began and had considerably advanced when it was unfortunately destroyed.

The argument of the Respondents is, that until the cargo was completed it did not become deliverable; and until it became deliverable, the property could not pass. No doubt the bill of lading was issued after the loss, as were the drafts by which the price was disbursed to the vendors; and the parties, we may presume, contemplated payment after the completion of the cargo. But the period of payment does not necessarily coincide with the period of possession, and, quite independently of the arrangement as to the bills of lading, and the determination of the price upon a future estimate, it seems to me that the partial delivery to the Plaintiff in a vessel which the contract had made, *pro hâc vice*, the sole recipient of his cargo, may be taken to have passed the property in the portion so delivered, involving an interest, either absolute or conditional, on the exercise of an option, to receive what was so given on account of, or in substitution for, the whole, sufficient to justify his claim on the insurers. He might have exercised the option in declining to take less than the full cargo; but if he did not, the property in the goods partially delivered, according to the view of the Court of Common Pleas, in which I concur, was his, as it would have been in the rest, on a complete delivery.

On this part of the case *Appleby* v. *Myers* (1) was much relied on. But the decision there went on the express terms of the particular contract, to which I find nothing exactly answering in that which is before your Lordships. In delivering the judgment of the Court, Mr. Justice *Blackburn* said (2) that "generally, and in the absence of something to shew a contrary intention, the

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Law Rep. 2 C. P. 651.

(2) Law Rep. 2 C. P. at p. 660.

bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete." "But," he added, "though this is the *primâ facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the work is complete, and not till then, and we think that the Plaintiffs in the present case had entered into such a contract." There, the period of the completion was fixed by the agreement of the parties as the period of the payment, and nothing could be got sooner, though the completion was prevented by an accident for which no one was to be blamed. Here the terms of the note do not point to the occurrence which caused the loss, but neither do they indicate an intention that the goods in the process of loading shall not vest in the buyer, at his option, before it is ended.

Two cases were cited in the course of the argument which appear to me to have a material bearing, in this regard, on that before us. In *Aldridge* v. *Johnson* (1) the Plaintiff had agreed to purchase 100 out of 200 quarters of barley which he had seen in bulk and approved of; and had paid part of the price. The purchaser was to send sacks for the barley, and the vendor was to fill those sacks and take them to a railway to be conveyed to the Plaintiff free of charge. Sacks were sent for a part only, and so much was delivered; but though the Plaintiff repeatedly demanded the remainder, he could not get it. The Court decided that the portion put into the sacks passed to the Plaintiff, Lord *Campbell* holding, that no portion of what remained in bulk ever vested in him. "It is equally clear," he said (2), "that as to what was put into the sacks there must be judgment for the Plaintiff. Looking to all that was done when the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the Plaintiff." And he relies on the *à priori* assent of the Plaintiff, and on his subsequent appropriation. "There remained," he says, "nothing to be done by the vendor, who had appropriated a part by the direction of the vendee."

The second case to which I have referred is *Langton* v.

(1) 7 El. & Bl. 885. 3 Jur NS 913. (2) 7 El. & Bl. at p. 899.

Higgins (1). There the Plaintiff had bought all the crop, for oil of peppermint, grown on a farm. The vendor sent to the Plaintiff for bottles, which he delivered, and a portion of the crop was put into some of them; but the rest were sold by the vendor to a third person, against whom the Plaintiff brought detinue. It was held that the putting of the oil into the Plaintiff's bottles was an act of appropriation which vested the property in him. The Chief Baron (*Pollock*) founded his judgment on the authority of *Aldridge* v. *Johnson* (2), deciding, as he said (3), "that the putting of the barley into the sacks was an appropriation which passed the property." And, farther, he observed: "I am of opinion that the putting of the oil of peppermint into the bottles was the same thing as the delivery of it to the Plaintiff." Baron *Bramwell* (4) also observed: "In all reason, when a vendee sends his *ship*, or cart, or cask, or bottles to the vendor, and he puts the article sold into it, that is a delivery to the vendee" (*i.e.* a delivery of the whole or part), for he adds: "Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the Plaintiff was not bound to take a part only, would the property vest?"—(The very case your Lordships have to consider.)—"*Aldridge* v. *Johnson* (5) is an authority on that point. It may be that the Plaintiff would have the option of refusing to take a part only of the oil or of accepting it; but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively; but, at all events, it would vest when he exercised the option."

It seems to me that these cases, if they were well decided, and I see no reason to call their authority in question, go far to sustain the view of the Court of Common Pleas on the point I am considering. They establish that the filling of the sacks and bottles amounted to an appropriation of their contents to the persons to whom they respectively belonged. And they establish farther, that, in the case of a partial delivery, although all the goods, which are the subject of an integral contract, have not been delivered, there may, in certain circumstances, be such an appropriation of a portion as to pass the property in it. According to Lord *Campbell*, at the moment when the barley was put into the sacks, "the property in each sackful vested," that is, there was a successive vesting, sack by sack; and whether one only, or a hundred, had been filled, the contents of each of them passed *eo instanti* to the purchaser. Baron *Bramwell* gives a reading on this decision in his own judgment, and applies it to demonstrate that "though only a portion of the oil had been put into the bottles," and "the Plaintiff was not bound to take a part only," nevertheless it vested either conclusively or on the exercise of his option.

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(1) 4 H. & N. 402.

(2) 7 El. & Bl. 885. 3 Jur NS 913

(3) 4 H. & N. at pp. 407, 408.

(4) Ibid. at p. 409.

(5) 7 El. & Bl. 885. 3 Jur NS 913.

Now, what have we here? A vessel is hired to do the Plaintiff's work (just as the sacks or bottles might have been hired to receive the barley or the oil), and designated as the recipient of the rice. What is the difference? The vessel was specifically described, and in it only, and for the plaintiff only, the cargo was to be deposited. Was not the deposit in it of the same effect for the purpose of the vesting of the property, with that of the deposit in the sacks and the bottles? And if the deposit in them was, in the words of Chief Baron *Pollock* "a decisive act of appropriation," or according to Baron *Bramwell*, amounted, in all reason, to "a delivery to the vendee," why should we deny the same operation to the deposit in this case? Lord *Campbell* relied on the *à priori* assent of the vendee of the barley, and his subsequent appropriation. And here we have what Chief Justice *Erle* once denominated "an anticipative appropriation" in a contract, without any condition of inspection or approval, to receive a "cargo" not in any way particularly described; and, as has been argued, not only a prompt payment by his drafts, but, perhaps, an anticipative exercise of the Plaintiff's option, by insuring, and so manifesting a purpose to receive, in the vessel, that cargo, and every part of it, at his own risk. There was nothing more to be done in the case than in *Aldridge* v. *Johnson* (1), as in both the delivery was only partial, and the residue of the property remained to be given.

The answer to this argument, as I understood it, was based on the fact that the vessel was not the Plaintiff's absolute property; but if it was hired for his benefit, and he was entitled to the exclu-

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(1) 7 El. & Bl. 885. 3 Jur N.S. 913

H. L. (E.)
1876
ANDERSON
v.
MORICE.

sive use of it, for the reception of the cargo he had bought, I am unable to understand that it was not his, for the time, to receive his cargo; and that it should not be dealt with accordingly for the purposes of this case. Would a delivery at a house hired by a vendee, for a day or a year, be less a delivery to him than if he held that house as a proprietor in fee?

I am, therefore, disposed, on principle and authority, to adopt the unanimous view of the learned Judges of the Common Pleas, that the Plaintiff had an insurable interest, "on the ground," as they have stated, "that the property in the rice had vested in him before the loss" (1).

But if there should be doubt on this point—and I cannot say that it is not open to serious question when there is such an equal balance of judicial authority upon it—I think he is still more clearly entitled to recover, because the contract and the conduct of the parties appear to me to afford sufficient evidence that the cargo, and every portion of it, were to be at his risk from the moment of delivery aboard the *Sunbeam;* and that he had, on that account, an insurable interest which warrants his demand. Mr. Justice *Blackburn* observed, in the Exchequer Chamber, that "risk and property generally go together." This is true, but they are not necessarily associated; and the risk only will suffice to sustain the insurance. It has been said, that insurance is a contract of indemnity, and the question has been put, What was the Plaintiff's loss? But we must remember that "although," in the words of Mr. *Phillips* (in *Phillips* on Insurance) (2), "the peril must be such that its happening might bring upon the assured a pecuniary loss, it is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence, were it to happen." The law is well stated by Mr. Justice *Willes* in *Joyce* v. *Swann* (3), that even if, by reason of special circumstances, the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he had in it.

The question, therefore, is, at whose risk was the cargo? What was the intention of the parties to the contract in relation to it?

(1) Law Rep. 10 C. P. 58, 75.

(2) Ch. iii. s. 174.

(3) 17 C. B. (N.S.) 84.

What was their understanding as proved by their words and their acts?

The liability to insure and the fact of insurance are, I think admittedly, strong indications pointing to the individual on whom it is designed that the risk of loss shall fall. It is reasonable so to consider them, for the casting of the liability on a man is a tolerable warning to him that he will suffer damage in the case of accident, unless he guards himself against it: and the fact of his insurance is a pregnant acknowledgment that he fears to encounter it, and accepts the burthen which the liability implies. Now, by the contract in this case, the liability to insure was thrown upon the purchaser, if upon any one. The costs and freight only were provided for. He bought at 9*s.* 1½*d.* per cwt. "cost and freight." If cost, freight, and insurance had been contemplated, the sum would have been 9*s.* 7½*d.* There is nothing to shew, directly or by implication, that the seller was to bear the risk, from any requirement that he should be protected against it. That seems the fair effect of the bought note considered in itself.

And then it has the clearest construction practically put upon it by the conduct of the parties. The seller does not think of insuring, and does not, in fact, insure at all. The buyer, on the contrary, insures on the very day after the contract is executed; manifestly not for any indirect purpose; not *post litem motam;* but in the fair, prudent, and reasonable fashion of a man having risk to run, and therefore interest to seek an indemnity. The insurance so effected was by a policy in the common form, beginning—"the adventure on the said goods from the loading thereof aboard the said ship." And it covered the entire cargo during the whole of the period from the first delivery until all had been put aboard; and from the time of that first delivery until the arrival of the ship at its destination.

If the matter rested there the contract, whether taken by itself or viewed in the light of the subsequent transactions, would be persuasive as to the incidence of the risk. But there is more to be considered. According to that contract it was "to be void should vessel not arrive at *Rangoon* before 30 April, 1871." It did, in fact, arrive on the 6th of March; and, on that day Messrs. *Gray & Walker* forwarded to the Plaintiffs a memorandum from

Messrs. *Barradaile, Schiller, & Co.* to this effect: "We beg to advise having received the following telegram from *Calcutta*, dated 6th March, '*Sunbeam, Rangoon.* Advise *Anderson*, insurance.'" Now, what did that mean? It does not appear that the Plaintiff had informed the vendors of the insurance he had effected on the day after the contract was made. That contract did not subject him to any liability before the arrival of the vessel at *Rangoon;* and, as soon as it did arrive, and before any portion of the rice was received, the vendors gave him notice of the arrival, accompanying that notice by the significant word "insurance." What did this convey, but that he should look to himself and insure against the risk before its commencement, when the loading should begin, as it did, three days afterwards? What other reasonable interpretation can be put upon the telegram? And if this was its real meaning, does it not go far to demonstrate the understanding of the senders and the mutual understanding between them and the purchaser, that he, and not they, should insure, because with him, and not with them, would be the risk from the moment of the reception of any portion of the cargo aboard the *Sunbeam.* I cannot conceive that any other meaning can be fairly attributed to the words; and if they have no other, they appear to me conclusively to shew the intention of the parties that the Plaintiff should insure, because in the event of loss he must be the sufferer.

But there is still more in the case. The correspondence which ensued immediately after the loss of the vessel indicates, in the plainest way, that all the parties engaged in the affair believed the risk of the cargo to be upon the Plaintiff. He is at once advised of the loss of it, and at once replies that he is "covered by open insurance policy to the extent of £6000 at *Lloyds.*" On the 12th of April Messrs. *Barradaile, Schiller, & Co.* send to him the invoice of the rice taken on board, viz. 8878 bags, costing £4787. 19*s.* 9*d.*, and drafts for that large sum with bills of lading. Those drafts are honoured without objection, and the whole price of the lost cargo is duly paid. That the payment was imperative on the purchaser, notwithstanding the loss of the goods, if they were taken at his risk, is apparent from *Castle* v. *Playford* (1);

(1) Law Rep. 7 Ex. 98.

and if I am right in considering that they were so taken, he was bound to pay, and is, therefore, entitled to recover.

Of course the correspondence and its result occurring after the loss cannot be taken as decisive, and are open to the observation made at the Bar, that the payment was voluntary, and was intended to shift the liability from the vendor to the underwriters. But I see no reason to doubt that it was perfectly *boná fide*, and was made because, on all hands, it was assumed that the purchaser was liable to make it, and would have full indemnity for his loss from the insurers. The insurers themselves do not seem, as I have already pointed out, to have doubted the justice and legality of the claim upon them if it should be proved that the loss had been caused by the perils of the seas. On this point only did they raise any controversy, and the denial of the insurable interest of the Plaintiff was an afterthought. So that there was, immediately after the accident, a *consensus* of all concerned—the vendor, the purchaser, and, so far as we are informed, the insurer—that, according to mercantile understanding, the risk was with the Plaintiff, and he had an insurable interest. If I saw any ground for supposing that there was trick or management in this part of the business, or any effort to shift unfairly responsibility for the loss, I should advise your Lordships to put these latter considerations out of account, if you should not rather use them to defeat the parties so offending; but I believe that there is no ground for any such impeachment, and if there is not, the instant demand and uncontested payment are, in my mind, strong evidence of the real intention of the parties, and the true bearing and effect of their relations to each other.

I have come to the conclusion, concurring with my noble and learned friend who will follow me, that the decision of the Exchequer Chamber should be reversed.

LORD SELBORNE:—

My Lords, with respect to the cross appeal of the Defendant, I believe all your Lordships are agreed that it should be dismissed with costs.

In the observations which I have to offer to your Lordships, I shall refer only to the principal appeal; that of the Plaintiff—as to which it is my misfortune to differ from two of your Lordships, as well as from the majority of the Court below;—my opinion being that this case was placed upon its proper ground by the judgment of Mr. Justice *Quain* in the Court of Exchequer Chamber.

It is, on all hands, admitted that if, by the contract between the parties, the rice was to be at the risk of the buyer during the time of its shipment at *Rangoon*, the Plaintiff (the Appellant here) was entitled to recover. I do not consider it necessary that this should have been expressed in the bought-note; it is sufficient in my opinion, if it appears by evidence proper to be considered by a jury, that the parties did in fact so agree. But I cannot read the terms of the bought-note without drawing from them the inference (which there is certainly nothing in the rest of the evidence to repel), that the intention of the parties was that the goods should be insured by the buyer. I do not understand that the majority of the Judges in the Court of Exchequer Chamber thought otherwise; but they were of opinion, that, as the time when the sellers, under the terms of the contract, would be entitled to draw upon the buyer for the price of the goods, and when the buyer would be bound to accept the goods in fulfilment of his contract, would not arrive until a full cargo had been put on board, the risk against which the buyer was intended to insure would commence at the same time and not earlier.

With this opinion I am unable to agree. The evidence satisfies me, as a matter of fact, that this was not the actual understanding or intention of the parties. On the next day after the contract, when there could be no object in shifting any burden from the right to the wrong party, the buyer did actually insure in terms which covered every bag of rice put on board from the first commencement of the loading of the vessel. The fact, that such an insurance had been made, seems not to have been then communicated to the sellers. But they made no insurance; and on the 6th of March, 1872, when the vessel was in the *Rangoon* river, exactly three days before it began to take in cargo, they advised the buyer, by telegram, that the ship was there, and called his attention to "insurance." I cannot understand this otherwise than as meaning that the time was then close at hand at which,

H. L. (E.)
1876
Anderson
v.
Morice.

by the commencement of the loading of the cargo, the risk intended to be insured against by the buyer would begin. Nor does it appear to me to be reasonable, or according to the probable and ordinary course of mercantile usage, that when a cargo is to be loaded at a given place, on board a particular ship, for a particular adventure, and when the duty of insurance is undertaken by the buyer, the parties should be supposed to mean to divide the risk; so that the buyer should insure after the cargo is complete, and the sellers (though nothing is said about it) until that time. When we have once got so far as the direct evidence leads us in this case, the presumption appears to me to be against such a distinction, and the burden of proof to be upon those who affirm it.

Mr. Baron *Bramwell* (a Judge whose opinions I always hold in the highest respect) considered it a sufficient answer to this that there might be a risk while the goods were on their way to, and yet not on board the ship, against which it would certainly not be for the buyer to insure; and the line must always be drawn somewhere. I cannot say that I am satisfied with that argument. The line in this case appears to me to be clearly drawn by the contract; whatever is within the scope of the contract is on one side of that line; whatever is not is on the other. The parties had of course in their contemplation the cargo of the ship and that only; and goods neither placed on board the ship as part of that cargo, nor subject to any maritime risks of that particular ship, as hired for that particular adventure (although they might be destined by their owner, possibly a different person from the seller, to fulfil a contract made by him for the loading of that vessel), would be altogether outside of this contract, and entirely unaffected by its provisions. But it is surely otherwise with goods put on board as part of the cargo, and subject to the maritime risks of the ship as hired for the particular adventure. The subject of the contract was "the cargo," not specific goods, nor a defined quantity of goods. Neither party contemplated the precise event which happened; both had in view the fulfilment of the contract by the loading and dispatching of a proper cargo. But they had both in view all ordinary maritime risks, and also the necessity of insuring against them, of which the risk, while the ship lay in the river taking in its cargo, was undoubtedly one: and it is certain that the act of insurance as to that or any other part of the risks, was not, as between the buyer and the sellers, an element of the price to be paid by the buyer. Nothing could be less likely than that when the buyer undertook to insure, an insurance was meant which would not cover the whole risk of the adventure, from its commencement, as to every part of the cargo; or that they should have thought of such a refinement as that goods put on board for the purposes of the adventure were not to be regarded as "cargo" for the purpose of insurance until the whole loading was complete.

Baron *Bramwell* himself seems to have thought that the risk of damage by perils of the sea to any part of the cargo on board during the process of shipment might possibly fall upon the buyer, and be insurable by him, if only the rest of the cargo should be afterwards also put on board by the sellers. It is certainly very improbable that the sellers can have intended to be responsible for such a loss, though I doubt whether such an opinion as to the incidence of a partial loss so occurring during the shipment is consistent with the principle of the judgment under appeal. Be this as it may, the case so put of a partial loss followed by a completion of the shipment, confirms me in the opinion that the insurance contemplated and intended between these parties was one which would cover the whole maritime risk during the whole process of shipment. All the acts of the parties, from first to last (though I have not thought it proper to lay stress upon anything written or done after the loss had occurred), seem to me to be entirely consistent with this view, and with this view only, of their intention and agreement.

So understanding the agreement of the parties as to insurance, I think it is sufficient for the decision of this case: "Merchants," said Mr. Justice *Blackburn*, when delivering his opinion in the case of *Allison* v. *Bristol Marine Insurance Company*, lately before this House (1), "according to my experience, attach very great weight to a stipulation as to who is to insure, as shewing who is to bear

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(1) 1 App. Cas. at p. 229.

H. L. (E.)
1876

ANDERSON
v.
MORICE.

the risk of loss." I agree in that remark, which is confirmed by several authorities. I think that it ought to be inferred, from the evidence of the understanding and intention of the parties as to insurance, in this case, that the buyer was to bear the risk of loss, as much as in *Castle* v. *Playford* (1).

This renders it in my judgment unnecessary to determine some other questions, which were very ably discussed during the argument at the Bar, and which, if the case were to depend upon their solution, might be attended with greater difficulty. I agree with the Court of Exchequer Chamber, that, if the Plaintiff had no insurable interest in the rice on board at the time of the loss, he could not acquire such an interest by any act or election afterwards. But, whether the shipment of the additional quantity of rice necessary to complete the intended cargo was "a thing to be done by the seller for the purpose of putting the quantity already shipped into a deliverable state," within the meaning of the doctrine explained in *Gilmour* v. *Supple* (2), and illustrated by *Rugg* v. *Minett* (3), *Aldridge* v. *Johnson* (4), and *Langton* v. *Higgins* (5): whether the shipment of the whole quantity intended to complete the cargo was a condition precedent to the vesting in the buyer of property in any part of it, and to his liability to pay for the part actually shipped, within the principle of *Appleby* v. *Myers* (6) and the cases which preceded it: or whether (as the Court of Common Pleas seems to me to have thought), the delivery of each bag of rice into the ship specially designated for that purpose by the contract had the effect of vesting the property in the Plaintiff, subject to his right to reject it, if the cargo were not duly completed; these are points as to each and all of which it is possible that one conclusion might be right, if there were no ground for holding that the risk of loss during shipment was undertaken by the buyer, and another, if the buyer did undertake that risk.

Inasmuch, however, as some of your Lordships take a different view (which, in case of an equality of voices, must prevail), I think

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(1) Law Rep. 7 Ex. 98.

(2) 11 Moo. P. C. 551.

(3) 11 East, 210.

(4) 7 El. & Bl. 885. 3 Jur NS 918

(5) 4 H. & N. 402.

(6) Law Rep. 2 C. P. 651.

H. L. (E.)
1876
ANDERSON
v.
MORICE.

it proper to add, that very little, if any, light, appears to me to be thrown upon this case by the authorities cited for the Respondent; the doctrine of *Gilmour* v. *Supple* (1) having certainly in view some act to be done to the goods directly in question, and not merely the addition to them of a farther quantity of exactly similar goods; and *Appleby* v. *Myers* (2) being only one of those numerous authorities which shew how the application of general rules may be varied by the special terms of particular contracts.

It is, in my view, enough for the purpose of the present decision, to find that the rice on board was, by the agreement of the parties, at the Plaintiff's risk when the loss happened; and, being of that opinion, I think that the judgment of the Court of Exchequer Chamber ought to be reversed; and I confess I very much regret the contrary decision, which will pass in the name of your Lordships' House, as a failure of what seems to me substantial justice.

THEIR LORDSHIPS being equally divided, the rule *Semper presumitur pro negante* applied, and the appeal was ordered to be dismissed.

4 App Cas 197

LORD SELBORNE:—My Lords, I do not know whether the rule *semper presumitur pro negante* applies to costs. I should have thought that that rule, if it did apply, would be against the motion for costs.

LORD CHELMSFORD:—In general, as far as I recollect, when a judgment or decree is affirmed or reversed in this House, the result determines whether there shall be costs or not. I remember a case perfectly well—I think it was the case of *Hopkinson* v. *Rolt* (3)—when Lord *Campbell* was Chancellor, and when he and Lord *Cranworth* and myself sat. The Lord Chancellor and myself were for affirming the judgment, and Lord *Cranworth* was for reversing it. Upon the question of costs Lord *Campbell* (the Lord Chancellor) said that he thought that as there was a difference of opinion there ought to be no costs; but Lord *Cranworth*, with that candour

(1) 11 Moo. P. C. 551.
(2) Law Rep. 2 C. P. 651.
(3) 9 H. L. C. 555. 7 Jur NS 1209

which always distinguished him, said, that he thought the rule was that the result determined whether there should be costs or not, without regard to any difference of opinion. I am quite in your Lordships' hands as to whether there shall be costs in this case or not.

LORD SELBORNE:—My Lords, I am far from saying that in this case the noble Lord and myself who took a different view from the rest of your Lordships may not be induced by the consequence which would follow from that rule to withdraw our voices, and so admit of a majority in favour of the motion which my noble and learned friend has made. What I ventured to say was that the rule *semper presumitur pro negante* as applied to the motion that certain parties should pay costs, would rather go against that motion. The case my noble and learned friend has referred to was not a case of an equal division of opinion in your Lordships' House, but a case of a majority. However, if my noble and learned friend opposite (Lord *Hatherley*), also thinks that this is a case which ought to carry costs, I shall not be at all disposed to press my opinion.

LORD CHELMSFORD:—I should like to hear what your Lordships think should be done in this peculiar case with regard to costs.

LORD O'HAGAN:—There must be precedents. The same equal division of opinion occurred in the case of *The Queen* v. *Millis* (1) and in the *O'Connell Case* (2).

LORD CHELMSFORD:—I may remind my noble and learned friend that *The Queen* v. *Millis* was a criminal case.

LORD HATHERLEY:—I think, technically, my noble and learned friend opposite (Lord *Selborne*) may be right in saying that the rule *semper presumitur pro negante*, would involve the contrary, with regard to costs, from what it does with regard to the original

(1) 10 Cl. & F. 534.

(2) 11 Cl. & F. 155.

order as the reversal of a judgment. But I would put to my noble and learned friend what takes place upon dismissing an appeal as guiding us upon this point. The question is put "that the appeal be dismissed;" if the rule *semper presumitur pro negante* were applied in that case the appeal must be hung up for ever. This case must certainly have occurred before.

LORD SELBORNE:—It is not worth while pursuing it farther. If my noble and learned friends both think that costs ought to be given, I shall not vote the contrary; but still, as far as the rule is concerned, I should have thought that when the House had voted that the judgment be not reversed, the dismissal of the appeal would only follow as a necessary consequence of that.

LORD HATHERLEY:—I can assure my noble and learned friend that I do not speak with any confidence in my own opinion upon this matter of costs; but I simply say as regards the common rule, that I do not see anything to take this case out of the common rule, that where the judgment complained of is not reversed, the appeal fails.

LORD CHELMSFORD:—Perhaps it would be better, under the circumstances, that the appeal should be dismissed without costs; that is to say, nothing should be said about costs.

Judgment affirmed; and appeal dismissed.

MORICE *v.* ANDERSON (*Cross Appeal*).

LORD CHELMSFORD:—

My Lords, this is a cross appeal, by the underwriter of the policy of insurance issued to the Appellant, in the case just disposed of. The underwriter, in answer to the claim of the assured upon the policy, pleaded that the vessel was not seaworthy. The only question argued in the Courts below was whether there having been *primâ facie* evidence of the unseaworthiness of the vessel, there was sufficient counter evidence of facts to make it a fair question for the jury whether the vessel was lost by the perils of the seas. All the Judges in the Courts below were of opinion, that the evidence was sufficient to warrant the finding of the jury. The two appeals being heard together, the argument at your Lordships' Bar was almost entirely confined to the appeal of *Anderson*, and the question of his insurable interest. Scarcely anything was said upon the question of seaworthiness, and certainly nothing to impeach the judgment of the Judges, or to shew that the evidence upon which the jury proceeded was insufficient.

I therefore submit to your Lordships, that the judgment of the Court of Exchequer Chamber ought to be affirmed: and this appeal be dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed, with costs.

Lords' Journals, 27th July, 1876.

Solicitors for the Appellant in the original appeal and Respondent in the cross appeal: *Parker & Clarke.*

Solicitors for the Respondent in the original appeal, and appellant in the cross appeal: *Hollams, Son, & Coward.*

[HOUSE OF LORDS.]

H. L. (E.)
1876
Nov. 21;
Dec. 1.

THE REV. THOMAS RADLEY AND HENRY BRAMALL . . . . . . Plaintiffs APPELLANTS;

AND

THE DIRECTORS OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY Defendants RESPONDENTS.

Negligence—Contributory Negligence—Misdirection.

Though a Plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the Defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the Plaintiff's negligence will not excuse him.

A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The Judge at the trial told the jurors that the Plaintiffs must satisfy them that the accident happened solely through the negligence of the Defendants' servants, for that if both sides were negligent, so as to contribute to the accident, the Plaintiffs could not recover:—

Held, a misdirection, and a new trial ordered.

THIS was an appeal against a decision of the Court of Exchequer Chamber.

The Appellants were the Plaintiffs in an action brought in the Court of Exchequer, in which they claimed to recover damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the Defendants' servants. The Plaintiffs were owners of the *Sankey Brook Colliery*, in the county of *Lancaster*, which was situated near a branch line of the Defendants' railway. There was a siding belonging to the Plaintiffs, which communicated with the railway, and the Defendants' servants were in the habit of taking trucks loaded with coals, from this siding, in order to run them on the railway to forward them to their destination, and also of bringing back empty trucks and running them from the railway on to the siding. On Saturday after working hours, when all the colliery men had gone away, the Defendants' servants ran some of the Plaintiffs' empty trucks from the railway upon the siding and there left them. In that position they remained. One of the watchmen employed by the Plaintiffs knew that they were there, but nothing was done to remove them to a different place. In the first of these trucks had been placed a truck which had broken down, and the height of the two trucks combined was nearly eleven feet. There was, in advance of the spot where the trucks had been left, a bridge placed over a part of the siding, the span of which bridge was about eight feet from the ground. On Sunday afternoon the Defendants' servants brought a long line of empty trucks belonging to the Plaintiffs, and ran them on the line of the siding, pushing on the first set of trucks in front. Some resistance was perceived, and the pushing force of the engine employed was increased, and the result was, as the two trucks at the head of the line could not pass under the bridge, they struck with great force against it and broke it down. For the damage thereby occasioned this action was brought. The defence was, contributory negligence; it being insisted that the Plaintiffs ought to have moved the first set of trucks to a safe place, or, at all events, not to have left the truck with the disabled truck in it so as to be likely to occasion mischief. At the trial before Mr. Justice *Brett*, at the Summer Assizes at *Liverpool*, in 1873, the learned Judge told the jury that "You must be satisfied that the Plaintiff's servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do . . . . It is for you to say entirely as to both points, but the law is this, the Plaintiffs must have satisfied you that this happened by the negligence of the Defendants' servants, and without any contributory negligence of their own, in other words, that it was solely by the negligence of the Defendants' servants. If you think it was, then your verdict will be for the Plaintiffs. If you think it was not solely by the negligence of the Defendants' servants,

H. L. (E.)
1876
RADLEY
v.
LONDON AND
NORTH
WESTERN
RAILWAY CO.

your verdict must be for the Defendants" (1). The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the Plaintiffs, the learned Judge directed that the verdict should be entered for the Defendants, but reserved leave for the Plaintiffs to move.

A rule having been obtained for a new trial, it was, after argument before Barons *Bramwell* and *Amphlett* made absolute (2). On appeal to the Exchequer Chamber the decision was, by Justices *Blackburn, Mellor, Lush, Brett,* and *Archibald* (*diss.* Justice *Denman*) reversed (3). This appeal was then brought.

Mr. *Herschell,* Q.C., and Mr. *Baylis,* Q.C., for the Appellants, the Plaintiffs below:—

There was no ground here for saying that there had here been contributory negligence, and the form in which that matter was left to the jury constituted a misdirection. There was no obligation on the Plaintiffs to move the trucks which the Defendants' servants had put upon the siding from that place to another, and certainly none for the Plaintiffs to summon their workmen on the Sunday to do so. They were not bound to assume that the Defendants' servants would bring the empty trucks on the Sunday evening, and then push them on the siding in a negligent manner, taking no care how they were driven, nor even stopping when an obstruction was perceived, but pushing on with greater force than before to overcome the obstruction. But, unless the Plaintiffs were bound to assume all this, and to act on that assumption, there was nothing whatever that could be construed into contributory negligence on their part.

Even if there had been any negligence on the part of the Plaintiffs, which was denied, it would not affect this right of action, unless it was such negligence that, but for it, the effect of the negligence on the part of the Defendants might have been avoided.

Bridge v. *The Grand Junction Railway Company* (4), *Davies* v. *Mann* (5), *Tuff* v. *Warman* (6), and *Walton* v. *The London and Brighton Railway Company* (7) were cited and relied on.

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(1) Printed papers in the case.

(2) Law Rep. 9 Ex. 71.

(3) Law Rep. 10 Ex. 100.

(4) 3 M. & W. 244.

(5) 10 M. & W. 546.

(6) 5 C. B. (N.S.) 573; 27 L. J. C. P. 322. 5 Jur N.S. 222

(7) 1 Har. & Ruth. 421.

Mr. *Aspinall*, Q.C., and Mr. *McConnell*, for the Respondents:—

There was clearly here negligence on the part of the Plaintiffs, and but for that negligence the accident might have been avoided; whether that was so or not was a proper question for the jury. The Plaintiffs knew of the trucks being brought on the Saturday afternoon; they knew that one of those trucks was disabled, and that that disabled truck was placed on another truck, and that the two together could not pass under the bridge. This was knowledge of facts relating to their own property. They ought to have removed the disabled truck; to leave it where it was they knew to be dangerous, yet they left it there, being quite well aware that in the ordinary course of business other trucks would be brought on the line and might be pushed against it. *Bridge* v. *The Grand Junction Railway Company* (1) distinctly established that if the plea had shewn that by ordinary care on the part of the Plaintiff the consequences of the Defendants' negligence might have been avoided, it would have proved an answer to the action. There could be no doubt that that was the case here, and the pleadings here had distinctly raised that defence. *Tuff* v. *Warman* (2) was a case of collision, but even there Mr. Justice *Wightman*, in delivering the judgment of the Court of Exchequer Chamber, said: "The proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the Defendant, or whether the Plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." In *Davies* v. *Mann* (3) the rule of law is stated to be, that the Plaintiff may recover unless by the exercise of ordinary care he might have avoided the consequences of the Defendant's negligence. Applying that doctrine to this case, it was clear that but for the want of ordinary care and caution on the part of the Plaintiffs the misfortune here might have been avoided. The direction, therefore, was right, and the verdict of the jury on this point, and the judgment of the Exchequer Chamber, ought to be sustained.

(1) 3 M. & W. 244.

(2) 5 C. B. (N.S.) 573; 27 L. J. C. P. 322. 5 Jur NS 222

(3) 10 M. & W. 546.

Mr. *Herschell* replied.

LORD PENZANCE:—

My Lords, the action out of which this appeal arises is an action charging the Defendants with negligence (through their servants) in so managing the shunting of some empty coal waggons as to knock down a bridge and some staging and some colliery head-gearing, which stood upon it, and belonged to the Plaintiffs.

The first question on the appeal is, whether the Court of Exchequer Chamber was right in holding that there was any evidence, proper to be submitted to the jury, tending to the conclusion that the Plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained.

The general facts of the case, the particular facts which gave rise to the imputation of negligence, and the contention of both sides as to the fair result of these facts, are stated in the judgment of the Court of Exchequer delivered by Baron *Bramwell.* [His Lordship here read the statement from Mr. Baron *Bramwell's* judgment (1).]

It may be admitted that this is a fair and full statement of the arguments and considerations on the one side, and on the other, upon which the question of the Plaintiffs' negligence had to be decided. But it had to be decided by the jurors, and not by the Court, and I am unable to perceive any reason why the learned Judge did wrong in submitting these arguments and considerations to their decision accordingly. The bare statement of them is enough to shew that there were in the case facts and circumstances sufficient at least to raise the question of negligence, whether they were a sufficient proof of negligence or not.

The decision, therefore, of the Exchequer Chamber upon this matter ought, I think, to be upheld.

The remaining question is whether the learned Judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

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(1) Law Rep. 9 Ex. at p. 72.

The first proposition is a general one, to this effect, that the Plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the Plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the Defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the Plaintiff's negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (1), supported in that of *Tuff* v. *Warman* (2) and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned Judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the Plaintiffs to satisfy you that this accident happened through the negligence of the Defendants' servants, and as between them and the Defendants, that it was solely through the negligence of the Defendants' servants. They must satisfy you that it was solely by the negligence of the Defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent so as to contribute to the accident, then the Plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the Plaintiffs' servants, they could not, without disregarding the direction of the learned Judge, have found in the Plaintiffs' favour, however negligent the Defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned Judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the Defendants, and then in the conduct of the Plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the Plaintiff must have satisfied you that this happened by the negligence of the Defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the Defendants' servants. If you think it was, then your verdict will be for the Plaintiffs. If you think it was not solely by the negligence of the Defendants' servants, your verdict must be for the Defendants."

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(1) 10 M. & W. 546.

(2) 5 C. B. (N.S.) 573; 27 L. J. C. P. 322. 5 Jur NS 222

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the Plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies* v. *Mann* (1), and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned Judge pointed attention to the conduct of the engine driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the Plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to shew that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine driver would, notwithstanding any previous negligence of the Plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned Judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

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(1) 10 M. & W. 546.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, I have had the advantage of considering the opinion which has just been expressed to your Lordships in this case by my noble and learned friend, and, concurring as I do with every word of it, I do not think it is necessary that I should do more than say that I hope your Lordships will agree to the motion which he has proposed.

LORD BLACKBURN :—

My Lords, I agree entirely with the noble Lord who has first spoken as to what were the proper questions for the jury in this case, and that they were not decided by the jury. I am inclined to think that the learned Judge did in part of his summing-up sufficiently ask the proper questions, had they been answered, but unfortunately he failed to have an answer from the jury to those questions, it appearing by the case that the only finding was as to the Plaintiffs' negligence.

I agree, therefore, in the result that there should be a new trial.

LORD GORDON :—

My Lords, I entirely concur in the motion which has been submitted to your Lordships by my noble and learned friend on the other side of the House. The question is one which has given rise to some difficulty in the Courts of *Scotland*, but I think that it is very likely that the opinion which has been expressed in this case will be regarded as a very useful authority for guiding their decisions.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

Lords' Journals, 1st December, 1876.

Solicitors for the Appellants : *Sharpe, Parkers, & Co.*
Solicitor for the Respondents : *R. F. Roberts.*

[HOUSE OF LORDS.]

H. L. (Sc.) BAIN *et al.* . . . . APPELLANTS;

1876 BRAND *et al.* . . . . RESPONDENTS.

March 16.

Heritable Character of a Scotch Lease.

A lease in *Scotland* is heritable, not moveable or personal, as in *England*, but descending to the heir of the lessee. Whether the lease be in perpetuity or for a term of years the descent will be the same.

Machinery annexed to Leasehold—Fixtures.

When machinery has been annexed to the leasehold soil for the working of coal underneath, it descends with the soil to the heir of the lessee.

Per THE LORD CHANCELLOR (1):—There is certainly no authority for saying that the executor can remove fixtures as against the heir.

THE material facts of this case are fully stated by the Lord Chancellor in his Lordship's address to the House. The question was whether certain machinery erected and used in a colliery by the lessee thereof under a lease for nineteen years, had become a fixture descendible to his heir; a lease in *Scotland* being heritable, and not personal, as in *England*.

The Lord Ordinary (2) held that "machinery attached or specially dedicated to the use of the leasehold property was heritable, and went with the lease to the heir, and not to the executor."

The Second Division of the Court of Session recalled the Lord Ordinary's interlocutor, and "in lieu thereof found that all the machinery therein referred to was to be considered as moveable (personal) in a question as to the tenant's succession." (3)

Against this judgment of the Second Division the present appeal was tendered to the House;

Mr. *John Pearson*, Q.C., and Mr. *Mackintosh* (of the Scotch bar), appearing for the Appellants; and

Mr. *Cotton*, Q.C., and Mr. *Bryce* for the Respondents.

At the close of the argument the Law Peers delivered the following opinions:—

THE LORD CHANCELLOR (1):—

My Lords, we have now to dispose of this appeal which was argued before your Lordships a few days since with very great ability.

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(1) Lord *Cairns*. (2) Lord *Shand*. (3) 4th Series, vol. ii. p. 258.

Robert Brand, the elder, was the lessee during his life of a colliery in *Cambusnethan;* he held it on a lease for nineteen years beginning in 1867. When I say it was a lease of a colliery, it was in point of fact a lease of certain seams of coal, with a right of the ordinary description to occupy such portions of the surface as from time to time he might find necessary for the purpose of working the colliery; and then as he occupied portions of the surface they were to be taken into account and rent paid for them at so much an acre. *Robert Brand*, the lessee, died in 1873, having made a trust disposition under which all his heritable and moveable property went to *Robert Brand* the younger, his son; and the lease, being, as your Lordships are aware, by the law of *Scotland* a heritable subject, would pass under the category of property which was heritable. Now this *Robert Brand*, the younger, in his turn died, and he died under the age of twenty-one years. He made a disposition which, according to the law of *Scotland*, it has been assumed would carry his moveable property, but would not carry the heritable subjects. The Appellants represent the heir of this *Robert Brand*, the younger, who has also since died; the Respondents, on the other hand, represent the trustees of the disposition to which I have referred.

My Lords, the precise issue which arises in the present suit is stated in certain articles of agreement for a settlement of the questions which had arisen between them,—"first, that the whole heritable property, including the lease of the *Green Head* colliery, shall be assigned, conveyed, and made over by the first parties as trustees foresaid to the second parties as trustees foresaid;" that is, it was agreed to assign and make over to the Appellants the whole heritable property. My Lords, in deciding under this agreement what is the heritable property, the question arose as to certain fixed machinery, which had been set up by *Robert Brand*, the elder, the original lessee. Lord *Shand* described this machinery in the following manner:

> In regard to the machinery and plant including rails which belonged to the deceased, *Robert Brand*, sen., and were used by him at or in connection with the colliery held on lease by him from Mr. *Houldsworth*: Finds that the machinery

and plant and those parts thereof, are heritable and belong to the trustees of the late *Alexander Brand*, which were attached either directly or indirectly by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed either in their entire state or after being taken to pieces without material injury, including those loose articles which though not physically attached to the fixed machinery and plant are yet necessary for the working thereof, provided they be constructed and fitted so as to form particular machinery and not to be equally capable of being applied in their existing state to other machinery of the kind.

My Lords, these words are in fact taken from an order of your Lordships' House made sometime since in a case which came by appeal from *Scotland*, namely, *Fisher* v. *Dixon* (1), and it may be assumed that they are words which correctly describe the character of fixed machinery, if the Appellants are entitled to machinery of that kind.

My Lords, from the decision of Lord *Shand* there was a reclaiming note, and the Second Division of the Court of Session recalled the interlocutor of the Lord Ordinary, and held in substance that this machinery did not belong to the Appellants, but belonged to the Respondents as trustees of the deed executed by the minor, upon the footing of the machinery being personalty or moveable. The Lords of Session having heard counsel, "recall the second finding of the said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveable in a question as to the tenant's succession;" that is to say, in the question as between the representatives of the tenant, the heir on the one hand and the executor on the other.

It is between those two different views that your Lordships have now to decide; and the argument before your Lordships has divided itself naturally into two points; in the first place there is the question whether this matter is not already covered by decision; and, secondly, if not covered by decision, what upon principle ought to be the view taken of it by your Lordships.

With regard to decision, it was contended at your Lordships' Bar, and it appears to have been the opinion of the Court of Session, that the case of *Fisher* v. *Dixon* (1) decided the question. Now I have looked very carefully into that case, and I am certainly of opinion that it cannot be accepted as a decision upon this point. With regard to the issue in that case, and the decision upon it in the Court of Session, the question stood thus: There was a very large claim made as between the heir and the executor of a certain person who owned very large property, upon which he had put up fixed machinery for the purpose of trade. The great question in the case was whether the heir of that person should have the machinery, or whether the executor should have it. But there was a further question, which appears in point of magnitude and the value of what was involved to have been comparatively a very minute one, as to what should be said of machinery upon certain property which the deceased had not been the owner of but had taken upon lease, and with regard to the machinery upon the property which was taken on lease there is no doubt that the decision of the Court of Session was in form that it formed part of his executory, that is, it did not go to the heir.

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(1) 5 Dunlop, 775; Decisions of the Court of Session, 2nd Series, vol. v. p. 775.

But when your Lordships examine the circumstances under which that decision was arrived in the Court of Session, your Lordships will find this remarkable fact. There was very great difference of opinion expressed upon the subject by the learned Judges. It did not form the staple and the principal part of their judgments, but the matter was referred to in a subsidiary part of the opinions which they expressed, and upon it, as I have said, there was very considerable difference of opinion. The finding of the Court of Session was in these terms: "With regard to the 7th class in the said report" (which was the class of machinery upon the leasehold property), "erections made on subjects held under leases by the late Mr. *Dixon*, and which have been removed by the Respondents at the termination of the said leases: Find that these are moveable and subject to the claim of *legitim* on the part of the claimants." It appears, therefore, from this interlocutor that the machinery had actually been removed by the Respondents, the executors, at the termination of the leases, and at the time of the litigation it would seem to have been in their possession. Still, no doubt, that finding would appear to have decided that the machinery was lawfully their property. But when your Lordships examine the case a little further, you find in the opinions of the consulted Judges this important passage: "And further, in so far as regards such subjects under lease, on which the late Mr. *Dixon*, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the Respondent also admits may be included in the executory, we are of opinion that that machinery belonged to those who represented the executor."

My Lords, looking on the one hand to the great divergence of opinion expressed by the Judges, and on the other to the final result of their deliberations, I am quite unable to accept this as a deliberate decision of the Court of Session, that under the circumstances of the case the machinery upon the leasehold property belonging to the deceased, would belong to the executor and not to the heir. It appears, I repeat, to have been a subsidiary and a minute point in the case, and the machinery upon the leasehold property appears ultimately to have been admitted by the heir to be properly included in the executory.

When the case came to this House by way of appeal, the Appellants were persons representing the executory and not the heir. Of course it was not for them to raise, and they did not raise, any question upon this point, which had virtually been given by admission in their favour in the Court below. The Respondents, who had presented no cross appeal, could not raise the question, and therefore the question did not fall in any way to be decided by your Lordships. Some expressions of opinion, not very distinct in the report which we have of them, appear to have fallen from Lord *Brougham* and Lord *Campbell*, and to some extent from Lord *Cottenham*. I think it is unnecessary to put any precise construction upon those expressions, because I repeat the matter did not fall to be decided; but, as far as I can gather from those expressions of opinion, there certainly appears to have been an impression upon the minds of those noble and learned Lords that there might have been a question raised on the part of the Respondent, which they rather commended him for not having raised, by means of a cross appeal.

My Lords, the case therefore being, in my opinion, uncovered by any decision which has settled the law upon the subject, I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are, with regard

H. L. (Sc.)
1876
BAIN
v.
BRAND.

to matters of this kind, which are included under the comprehensive term of "fixtures," two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is quite a different and a separate rule;—whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which, in the law of *England*, is called waste, and which, according to the law both of *England* and *Scotland*, is undoubtedly an offence which can be restrained. Those, my Lords, are two rules, not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremoveability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy. What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance, may have as against the heir, whether in point of fact he has any right of removal at all, or any right to take more than that which really and properly considered was never fixed to the inheritance in a definite way, I need not stop to consider, because the case of *Fisher* v. *Dixon* (1) has clearly decided by the authority of your Lordships that fixtures of the kind now before your Lordships cannot be removed by the executor of one who is complete owner of the inheritance.

Therefore your Lordships have upon the one hand the rule as laid down in the case of *Fisher* v. *Dixon* (1), that fixtures of the present kind cannot be removed by the executor as against the heir of the complete owner of the inheritance, and you have on the other hand the exception to which I have referred, that fixtures of this kind can be removed by the executor of a tenant, or by the tenant himself as against the landlord during the course of the tenancy. But your Lordships have here to consider an intermediate case between those two. You have not to consider the case of the person who represents the entire inheritance, but you have to consider the case not of the whole inheritance but of a heritable subject, namely, a lease which is heritable according to Scotch law, upon the ground included in which fixtures of the kind I have referred to have been erected: and you have to determine whether, the tenant having died, and the lease still continuing, and the lease having passed to the heir, the executor has as against that heir a right to remove those fixtures. There is certainly no authority for saying that the executor can remove these fixtures as against the heir. In my opinion there is no principle in the rules which I have endeavoured to express which can warrant that right of removal. These things which I have termed fixtures are *ex hypothesi* annexed to the inheritance at the time of the death of the tenant. Thereupon the heritable subject, namely, the lease, at once passes to his heir. What right has the executor, or how is that right founded, to come upon the heritable subject which has passed to the heir, and to strip it of those things which have become fixed to it? There is no doubt, *ex hypothesi*, a right to remove these fixtures as against the landlord, but who is the person to exercise that right? It is not a right in gross, it is not a right collateral to the ownership of the subject, it is a right which of necessity must be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject. But the owner of the subject is not the executor. The owner of the subject is the heir, and therefore, as it seems to me, your Lordships are obliged to consider the person to whom the subject itself has passed, and to hold the right which is annexed to that subject to be exerciseable by that person, and by that person only.

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(1) 5 Dunlop, 775.

My Lords, looking at it in another way, it is decided already

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(1) 5 Dunlop, 775.

H. L. (Sc.)
1876
BAIN
v.
BRAND.

by the case of *Fisher* v. *Dixon* (1), that the executor cannot remove these fixtures as against the owner of the whole of the heritable subject. Upon what principle, therefore, is it that he could remove these fixtures as against him who is the owner of a part of the heritable subject? My Lords, every reason which was advanced in the case of *Fisher* v. *Dixon* (1) shewing how strained, how improbable, how inconvenient it would be that there should be a right to strip the inheritance of fixtures of this kind put up for the better use of the inheritance, can equally be advanced against the inconvenience of stripping that which continues a heritable and enduring subject, and which is in the possession of the heir, of those things which are necessary for the convenient use of that subject.

Therefore, my Lords, without pursuing the subject further, I submit to your Lordships that upon principle it is impossible to justify the right of the executors in this case.

When I look at the grounds of the decision in the Court of Session I find them expressed in the opinion of Lord *Gifford*. Those grounds are two: In the first place, Lord *Gifford* considers the subject to be already decided by the case of *Fisher* v. *Dixon*. I have ventured to express to your Lordships a contrary opinion upon that point. Then, on principle, Lord *Gifford* gives the following reasons for arriving at the same conclusion:

> I take it to be perfectly fixed law, and it was not disputed on either side of the Bar, that in leases of ordinary duration where the tenant erects fixtures solely for the purposes of his trade, these trade fixtures remain his property and cannot be claimed by the landlord as *partes soli*, as it is said they are moveable in a question between landlord and tenant. *Syme* v. *Harvey* and other cases are illustrations of the application of this principle. Now it humbly appears to me that if trade fixtures do not go to the landlord they must of necessity remain the moveable property of the tenant, and must remain moveable, *quoad omnia*.

My Lords, this is the basis of the decision of Lord *Gifford*, and if this statement were correct I possibly should arrive at the same conclusion at which he has arrived. But, my Lords, there is, as it appears to me, a complete fallacy in this mode of stating the facts. Lord *Gifford* appears to assume that you are to determine at the moment the fixture is placed in the soil what is to be its destiny during the whole of the lease, and he asserts that it never becomes attached to the inheritance so as to be capable of being called a part of the inheritance—that it remains *quoad omnia* moveable and amongst the moveables of the tenant. My Lords, it appears to me that that is an error; it does become attached to the inheritance. The fixture does become part of the inheritance; it does not remain a moveable *quoad omnia;* there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance.

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(1) 5 Dunlop, 775.

My Lords, that disposes of the whole case, with the exception of an argument which was raised, but which I think your Lordships will not consider, namely, whether there might not be a question of destination here as regards some of the articles brought upon the ground under lease. It appears to me that no such question arises. The interlocutor of the Lord Ordinary raises no question of that kind. It follows the wording of the order of this House in the case of *Fisher* v. *Dixon* (1), and it speaks of those things which are either attached to the inheritance or attached to what is attached to the inheritance. My Lords, it is only upon things of that kind that any order now made by your Lordships will operate, and no order that I shall propose to your Lordships will operate by treating any of this machinery as machinery destined to be attached to the inheritance.

My Lords, upon the whole I would propose to your Lordships to restore the interlocutor of the Lord Ordinary and to give to the Appellants, what they should have had in the Court of Session, the expenses of the reclaiming note, and with that direction to remit the case to the Court of Session.

LORD CHELMSFORD :—

My Lords, the question to be determined upon this appeal is, whether certain machinery used upon a colliery held under lease is moveable or heritable; belonging, if moveable, to the Respondents as trustees and executors of *Robert Brand*, jun., and, if heritable, to the Appellants as trustees of *Alexander Brand*, the heir of *Robert Brand*, jun., and of his father, *Robert Brand*, sen.

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(1) 5 Dunlop, 775.

The machinery in question was erected by *Robert Brand*, sen., for the purpose of working the colliery, which he held under a lease for nineteen years. When the lease had eleven years to run, *Robert Brand*, sen., died, having made a trust disposition of all his estates, heritable and moveable, under which it is admitted that his only son, then a minor, took a vested interest in the lease and machinery. *Robert Brand*, jun., survived his father for a few months, and died before attaining majority. He left a settlement which professed to dispose of all his estates heritable and moveable. Being a minor at the time of the settlement, it could not operate upon such parts of the estates as were heritable. A leasehold, by the law of *Scotland*, being realty, the lease of the colliery fell to the heir of the settlor. Whether the machinery went also to the heir with the lease, or passed under the trust disposition of *Robert Brand*, jun., depends upon whether in a case of succession it is in its nature heritable or moveable.

A great part of the note of the Lord Ordinary and of the judgment of the Court of Session is employed in considering whether the question at issue between the parties had or had not been decided in the case of *Fisher* v. *Dixon* (1), first in the Court of Session, and afterwards upon appeal to this House. With respect to the decision of the House, the question of the right to fixtures erected for the purposes of trade upon a leasehold was not before it, there being no appeal against the interlocutor of the Court of Session upon this point.

I will not enter into an examination of the difference between the Lord Ordinary and the Court of Session as to how the opinions of the Judges in *Fisher* v. *Dixon* (1) upon the question are to be reckoned. Assuming that a majority of them were in favour of the judgment that the tenant's fixtures were moveable, there were circumstances connected with this finding which deprive it of much of its authority. The fixtures were of trifling value, and were therefore probably not much considered in the argument. This probability is greatly increased by the Respondent having admitted, as stated by the consulted Judges (*Bell's* Appeal Cases, p. 343), that the fixtures in question must be included in the executory. It is quite true, as stated by Lord *Gifford*, that "in

(1) 5 Dunlop, 775.

actually deciding a point of law the Court never do so upon mere admissions by counsel," but where an admission is made a Court is not likely to examine the point so closely as when it is contested and fully argued. It is necessary to advert to the conflicting opinions of the Lord Ordinary and the Judges of the Court of Session as to the application of *Fisher* v. *Dixon* (1) to this case, because Lord *Gifford*, at the close of his judgment, says he prefers to rest it mainly upon general doctrine which he thinks is fixed by *Fisher* v. *Dixon* (1), "that a mere tenant's trade fixtures in an ordinary case are moveable *quoad* succession and descend to his executors."

The law as to fixtures is the same in *Scotland* as in *England*. The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim "*Quicquid plantatur solo solo cedit.*"

Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.

A question between landlord and tenant as to fixtures can rarely arise except with regard to the description of those which the tenant claims the right to remove. But the present question is between heir and executor, and depends upon the character of the fixtures whether they are part of the realty or not. The lease itself is admittedly realty. The fixtures were annexed to the soil by the owner of that realty. If he had been owner in perpetuity there would have been no doubt that the fixtures would have been part of the inheritance. Can it make any difference that he was owner for a limited period? He was as absolute owner of the realty during that period as if he had had it for ever. The fixtures were annexed to the ground for use during the whole term of enjoyment of the heritable subject. There is nothing in the terminable character of the lease at different periods that can affect the question, for as long as it continues it preserves its heritable character. So the power reserved to the landlord to purchase the machinery at the end of the lease, though it might interfere with the right of removal as against the landlord, cannot have the effect of changing the heritable character of the fixtures.

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(1) 5 Dunlop, 775.

Lord *Gifford* says "the only thing that can make the fixtures heritable is their annexation to the soil, but that would carry them to the landlord, to whom alone the soil belongs." But this is not quite accurate. The question arises at a time when the portion of the soil included in the lease of the colliery belongs to the lessee as owner of the realty as long as the term endures, and the landlord's right to the fixtures does not arise till the termination of the lease. Adverting also to an argument stated by him to have been used to prove the heritable character of the fixtures, that they were fixed to the lease so as to go with it to the tenant's heir, Lord *Gifford* observes: "A lease is an incorporeal right, and it is difficult to follow what is meant by a fixture to a lease." If the argument was as represented, it was certainly incorrect, for the machinery was not fixed to the lease but to the subject of it, the colliery; nor do I comprehend what is meant by a lease being an incorporeal right—leases may be of incorporeal as well as of corporeal hereditaments, but a lease itself is neither corporeal nor incorporeal.

The conclusion at which I have arrived is that the lease of the colliery being realty, the annexation of machinery to the soil for the purpose of working it became an accessory to the principal subject and partook of its character; that *Robert Brand*, jun., might, if he pleased, have separated the fixtures from the soil and so made them part of his personal estate. But not having done so, they remaining attached to the ground, went as part of the realty to the trustees of *Alexander Brand*, the heir of *Robert Brand*, jun.

I agree with my noble and learned friend that the interlocutor appealed from ought to be reversed.

LORD O'HAGAN:—

My Lords, this case has been argued on authority and on principle. For the Respondents it was contended, and the contention is sustained by the judgment of Lord *Gifford*, speaking for himself and his colleagues in the Court of Session, that the point in it was decided by that Court in *Fisher* v. *Dixon* (1), in a final interlocutor which was the subject of appeal to and affirmation by your Lordships' House. On the other hand, the Appellant insists that the interlocutor in question is not decisive, as being, in terms, inconsistent with the reported opinions of the learned Judges who pronounced it, and to be accounted for only on the supposition that, in the single matter which affects the controversy before us, it was pronounced upon consent—that, in that matter, it was not presented for decision here by the appeal, and was not, in fact, dealt with at all by the judgment of this House; and that the question thus remaining open, it should have been, on principle, ruled against the Respondents.

Certainly, the proceedings of the Court of Session in *Fisher* v. *Dixon* (1) are affected with much obscurity and difficult to be clearly understood. A great part of the conflicting judgments of the Lord Ordinary and Lord *Gifford* is occupied with an enumeration of the Judges who discussed and decided that case, and an elaborate detail of their individual opinions, with a view of shewing that the majority favoured the Appellants and the Respondents respectively. The Lord Ordinary comes to the conclusion that the greater number sustained the contention of the Appellants. Lord *Gifford* reaches the very opposite conclusion, and declares his opinion to be that "the question has been decided" (the other way) "as authoritatively as any question can possibly be decided in *Scotland*, by a majority of the whole Court." It is odd that able men, deliberately considering a series of judgments, could have so entirely differed as to their import and effect; and it is hard to decide with confidence between them. But this I may say, inclining rather to the adoption of the view of the Lord Ordinary,

(1) 5 Dunlop, 775.

H. L. (Sc.)
1876
BAIN
v.
BRAND.

that the irreconcilable antagonism of such eminent persons may, perhaps, justify your Lordships in refusing to acknowledge the conclusiveness of the judgments, one way or the other, either in the Court of Session or in this House, as to the matter before you, and in looking beyond them to the principles on which your own independent decision should be based. For myself, I am content with this result, and I decline to count the numbers or to weigh judicial opinions which are open to such diversity of skilled construction.

Then, as to the interlocutor relied on by the Respondents, it is no doubt unequivocal in its phraseology, and would be authoritative if the judgments which preceded it did not cast serious doubt upon it. But when this is so, and when, besides, we have clear proof that the Respondent in *Fisher* v. *Dixon* (1) admitted that the erections which he was entitled to remove at the end of the lease might be "included in the executry,"—being, as has been shewn, of small appreciable value,—we may, I think, concur with the Lord Ordinary,—even without holding, as he did, that the finding is directly contrary to the judgment of the majority of the Judges,—that it proceeded upon admission, and does not increase the authority of the case. As to the appeal to the House of Lords, it is enough to say that the present question was not really raised by it. For the purpose of raising that question there should have been a cross appeal. As there was not, the House could not deal with it; and we cannot doubt, on reference to its ruling, that it carefully and expressly abstained from adjudicating on any point which it was not required to decide. So far as there is any indication of opinion by the learned Lords who heard the appeal, it is given in favour of the Appellant here by Lord *Campbell* when he repudiates the distinction "attempted to be made between leasehold and freehold," which he holds entirely to fail, "when we bear in mind that by the law of *Scotland* the leasehold is realty and it goes to the heir."

I have satisfied myself that the question in this case is open and unconcluded by authority; and although I cannot accept the Appellant's representation that the judgments in *Fisher* v. *Dixon* (1) are decisive in his favour, I think that, on principle, he is entitled to succeed, and that the machinery dealt with by the Lord Ordinary, in a very careful and guarded manner, goes to the heir and not to the executor. I can add little to the reasons which your Lordships have already heard in support of this opinion; but the case is important, and I shall say a few words.

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(1) 5 Dunlop, 775.

There has been no dispute about the law, which is the same in *England* as in *Scotland*, and has been so from very early times, giving to the heir machinery fixed and attached to the soil. If the property had been, in this case, freehold, there could have been no controversy as to the application of the rule. The executor could not have been heard to contest the claim of the heir. But the property is leasehold; and, no doubt, in *England*, that rule would not have been applicable in the circumstances of this case. In *Scotland*, however, the heir takes the lease as he takes the feu; and the incidental right to fixtures which the latter would have given him, in my opinion, attaches to the former. The cases have not been distinguished in principle, and I know no authority shewing that they should be differently dealt with, in this regard. The Scotch heir has property in the lease which is identical in kind with his property in the freehold, although they may vary in duration and degree. It was urged in the very able and learned argument of Mr. *Bryce*, that the leasehold gives him only an incorporeal hereditament, whilst the freehold clothes him with permanent ownership of the land. But surely in both cases the soil goes to him equally: in the one case by inheritance or assignment, in the other by demise; but, in both, he has the soil, and has it completely, for a time or for ever, according to the nature of his interest; and any fixtures attached to it have precisely the same connection with it, and are equally a part of it, so long as his ownership endures. As between heir and executor, there seems to be no cause for holding that their destination should be diverse, or that the same old rule should not be applied indifferently to both. Settled exceptions exist in the interest of trade and from the exigencies of social life, as between tenants for life or in tail and remaindermen, and as between landlords and tenants. But there is no ground for such a relaxation of the strict law, and there has been no such relaxation, in fact, as can avail the Respondents in their attempt to abridge the rights of the heir when he succeeds to the leasehold as well as to the feu.

The principle which underlies the rule of law has been properly said to be that machinery attached to the land follows it as its accessory in the case of the freehold—The land is heritable, and so are the fixtures; and why, having a like attachment, should not the machinery going with a leasehold which is heritable become accessorially heritable also? I see no sufficient reason, in the absence of authority, for holding it moveable in one case and heritable in another.

I do not go into the argument which has been founded on policy, or into the illustrative cases which were discussed in the Court of Session. It suffices for me to say, that the presumptions arising as to the purpose of the tenant from his use of the fixtures on a property in which he has a limited and terminable interest, and the considerations as to the benefit of trade which have secured to him the exceptional privilege of removing those fixtures before the close of his tenancy, do not arise or apply as between executor and heir. They do not apply in reference to fixtures attached to the freehold, and as soon as we ascertain that a Scotch leasehold is heritable, they have as little application to it against the heir.

The law as to trade fixtures is well stated (as to cases of mortgage) by my noble and learned friends Lord *Hatherley* and Lord *Selborne* on an appeal before your Lordships during the past year, and the observations are of force with reference to the principle by which our judgment should be governed. "The law," said Lord *Hatherley*, "has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet if he do remove them during the lease he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and, if they are not removed as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade they might, during the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to them for the purpose of removal if he chose to allow the time to pass during which he might have removed them, and so far severed them from the property" (1).

No doubt, as Mr. *Cotton* argued, the case of a mortgage, to which Lord *Hatherley* particularly referred, is not identical with that before the House. But these remarks are of general application in this country; and I do not, with great respect for the Lord Ordinary, concur with him that "the law of *England* does not afford any assistance in the decision of the present question, because leasehold property is in *England* moveable estate in a question of succession." On the contrary, it seems to me that the leasehold in *Scotland* being heritable, as the freehold is in *England*, the heir, who is put for the purposes of succession in the same relation to both, should have, as to both, identical rights so far as the nature of the estate permits, and that, therefore, all the reasons on which the English law is based, and the conclusions which they warrant, are of force to secure to him those rights,—the executor in *Scotland* being deprived of the interest in chattels real which he enjoys in this country.

On the whole, I concur with the noble and learned Lords who have preceded me, that the interlocutor of the Lord Ordinary should be sustained. I shall only add a word as to the terms of it which have been the subject of controversy. It designates the machinery which it pronounces heritable, not by pointing to any catalogue of the parts of which it is composed, such as we have had before us, but by describing it as "attached either directly or indirectly by being joined to what is attached to the ground," for the use and in the manner which it indicates. And by that accurate description it anticipates and answers the argument which has been founded on the details of the catalogue and the report of Mr. *Geddes* (2). Your Lordships were asked to amend the interlocutor by putting the word "physically" before the word "attached," but I think any such amendment unnecessary. Attachment "to the ground" must mean "physical" attachment; and, if the preceding part of the sentence could have admitted of any doubt in this respect, the subsequent words, pronouncing as also heritable loose articles which, "though not *physically* attached" to the fixed machinery, are necessary for its working, put the meaning, as I conceive, by contrast, beyond all dispute.

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(1) *Meux* v. *Jacobs*, Law Rep. 7 H. L. 490.

(2) Mr. *Geddes* was the mining engineer to whom a remit was made by Lord *Shand*, see 4th Series, vol. ii. p. 260.

Upon the whole, my Lords, I entirely concur in the proposition which has been submitted to your Lordships by my noble and learned friend the Lord Chancellor.

LORD SELBORNE:—

My Lords, I agree with the opinions your Lordships have delivered.

The lessee has right, during the term of the lease, to the whole heritable subject, including those things which have become accessions to that subject by being affixed thereto. So long as his estate under the lease continues, there is no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee simple.

Nor can it make any difference that, as against the landlord, who is the owner in fee simple subject to the lease, the lessee, who has during the term placed upon the subject fixtures severable without damage to the landlord, has the same right of severing and removing those fixtures which an owner in fee simple, during his lifetime, would have had. This is a right which, on the death of the lessee before any severance has taken place, passes to his successor in the estate: in *England*, to his executor, because there his executor succeeds to the lease; in *Scotland*, to his heir, because a lease for years is heritable in *Scotland*.

The authorities, except *Fisher* v. *Dixon* (1) in the Court of Session (which, for the reasons stated by my noble and learned friends who have preceded me, is an authority of no real weight to the contrary), are all consistent with this view. It is unnecessary to consider any distinctions which the law has introduced in favour of creditors, because there is no question with creditors in this case.

The interlocutor appealed from reversed; the interlocutor of the Lord Ordinary of the 4th August, 1874, *restored; and the cause remitted back with a declaration that the reclaiming note presented*

(1) 5 Dunlop, 775.

H. L. (Sc.)
1876
Bain
v.
Brand.

against the Lord Ordinary's interlocutor ought to have been refused with expenses; and that the expenses to which the Respondents were found entitled, if paid by the Appellants to the Respondents, ought to be repaid.

Agents for the Appellants: *Holmes, Anton, Greig, & White.*
Agent for the Respondents: *William Robertson.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1876
June 22.

PHOSPHATE SEWAGE COMPANY . . . APPELLANTS;
MOLLESON . . . . RESPONDENT.

Stay of Suit for the expected Decision of another Court refused.

5 Ch D 418

Whether a Court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority, is merely a question for the exercise of judicial discretion.

If there be any want of power in the Court it may be well that the proceedings should be stayed in order that some other Court which has the requisite power may adjudicate.

Per LORD SELBORNE:—I am far from saying that there might not be cases in which a proceeding in a foreign Court might be regarded as a satisfactory way of ascertaining the legal rights of parties; and the Scotch Courts might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion and say the Court of Session must take into consideration what has been done in the English suit. There was no lack of materials in *Scotland* for the necessary purposes of justice.

THE *Phosphate Sewage Company*, of *London*, put in their claim for upwards of £70,000 against the bankrupt estate of Messrs. *Lawson & Son*, merchants in *Edinburgh* and also in *London*, on the ground of their having deceived the *Phosphate Sewage Company* into the purchase from the Government of *San Domingo* of an unproductive concession of guano on the Island of *Alto Vela*. The trustee (the above Respondent) "pronounced a deliverance" rejecting the claim (1).

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(1) 19 & 20 Vict. c. 79, ss. 127, 128.

See Phosphate Sewage Co. v Hartmont
5 Ch D. 418
See Appl from decree at hearing 4 App Cas 80

H. L. (Sc.)
1876

PHOSPHATE SEWAGE COMPANY.
v.
MOLLESON.

The *Phosphate Sewage Company* appealed to the Lord Ordinary (Lord *Shand*) insisting, in the first place, that the proceedings in the Scotch sequestration should be stayed until judgment was obtained in a suit involving the same question and between the same parties in the English Court of Chancery. Secondly, that the trustee should be ordered to set aside a dividend to meet the Appellants' claim; and, thirdly, that the "deliverance" of the trustee ought to be recalled. The Lord Ordinary (Lord *Shand*) repelled the first and second pleas; but allowed the parties a proof of their respective averments. The First Division affirmed this decision; the Lord President observing that the Court of Session was not to "demit its undoubted jurisdiction because the Appellants had chosen to institute proceedings in the Court of Chancery; the system of bankruptcy in *Scotland* being at once the most economical and the most expeditious that had ever existed" (1).

Against this decision the *Phosphate Sewage Company* appealed to the House of Lords, having for their counsel Mr. *Napier Higgins*, Q.C., Mr. *H. Davey*, Q.C., and Mr. *Alexander Young*.

For the Respondent, the trustee Mr. *Molleson*, Mr. *John Pearson*, Q.C. and Mr. *Locock Webb*, Q.C., appeared.

At the close of the argument on behalf of the Appellant, the Law Peers, without calling on the Respondent's counsel, delivered the following opinions:—

THE LORD CHANCELLOR (2):—

My Lords, the circumstances attending the litigation in this case are undoubtedly somewhat peculiar, and have led to a length of argument to every portion of which it will not be necessary that I should now advert.

The firm of *Lawson & Son* carried on business in *Edinburgh* and in *London*; they became bankrupt in the beginning of the year 1873, and the trustee of the sequestrated estate was chosen in the manner usual in *Scotland*.

(1) Scotch Cases, 4th Series, vol. i. p. 840.

(2) Lord *Cairns*.

My Lords, there is a bankruptcy in *Scotland*, the assets to be administered are in *Scotland*, and the trustee, who is the guardian of those assets, is in *Scotland*. The persons who make a claim against those assets go to *Scotland* and make their claim in *Scotland*, and they do all that before any proceedings whatever are instituted in *England*. They are allowed a condescendence and they are allowed proof in *Scotland*. They may state any case which they have to allege upon their condescendence, and they may prove it upon their proofs. They have a diligence by which they can recover all the documents which are in the possession of the Defenders; and, as we observe here, they have the advantage of examining the persons who are principally concerned in the transactions which are impeached.

My Lords, if in that state of things there is any want of power in the Court of *Scotland* to adjudicate upon a case of this kind, then it may well be that the proceedings should be arrested or stayed in order that some other Court which has the power may adjudicate upon the claim which is made. But is there any want of power in the Scotch Court? The learned Judges say there is not. The learned Judges unanimously tell us that it is the common practice of the Courts in *Scotland*, where a claim is made in a sequestration to constitute a debt or to constitute a liability to damages, to admit the party claiming to constitute that claim if he is able to do so. A full opportunity has been afforded to the parties here to constitute their claim. If they have not alleged in their condescendence as much as they have alleged in their bill in Chancery in *England*, it is their own act, and one for which no person but themselves is answerable. My Lords, I am bound to say that it appears to me that it would be casting upon the jurisdiction of the Court of Bankruptcy in *Scotland*, and upon the administration of the bankruptcy law in *Scotland*, a very considerable and a very grave reproach if your Lordships were to accede to the argument that there is any want of power in the Court of *Scotland* to adjudicate in a case of this kind.

But then it is said that there are other persons who are parties in the suit in *England*, and that it is much more convenient that the matter should be adjudicated upon once for all in the presence of all parties. My Lords, I say, in the first place, it would be a very grave question whether the adjudication of the Court in *England* would not be examinable in *Scotland*, so far, at all events, as the judgment of a foreign Court is examinable. But I by no means accede to the proposition, at least as a self-evident proposition, that it is convenient to have this adjudication in the presence of all the parties concerned. Your Lordships have been told that the circumstances under which, upon a claim of this kind, proof is admitted in *Scotland* upon a bankruptcy, are extremely different from the circumstances under which it is admitted in bankruptcy in *England*. The Court in *England* is asked to declare, not merely that Messrs. *Lawson & Son* are liable, but that there is to be a right to a particular proof against their trustee in a Scotch sequestration. How is the Court of Chancery in *England* to tell what is the course in *Scotland* with regard to proof, or what is the kind of proof which according to the Scotch law of sequestration ought to be allowed? The case against Messrs. *Lawson*, be it well founded or be it not well founded, is one which can be perfectly well separated from the case against the other parties who are said to be liable to the *Phosphate Sewage Company;* and I can see no reason why the case, if there is power in the Scotch Court to adjudicate upon it, should not be adjudicated upon there. And I repeat I also see no reason to doubt that there is perfect power in the Scotch Court to adjudicate upon it.

Therefore, my Lords, I submit to your Lordships that the first two pleas in this case entirely fail, and that the Courts in *Scotland* were right, the Lord Ordinary in the first instance and the Court of Session afterwards, in holding that there was no ground for sisting the proceedings, and that the claim must be tried upon its merits.

Then, my Lords, upon the merits of the claim this other plea is alleged (the fourth):

> The sale of the concession having been fraudulently made to the Appellants' company by the said firm of *Peter Lawson & Son*, and individual partners thereof, for the purpose and in the circumstances condescended on, and the same having been annulled, the Appellants are entitled to be reimbursed the sum paid therefor with interest, and the Respondent should be ordained to admit the said claim accordingly.

The fifth plea of the Appellants is:

> The said concession having, to the knowledge of the said *Peter Lawson &*

Son and individual partners, been at the date of the said sale liable to be forfeited, and having been subsequently declared void in respect of what had occurred prior to the said sale, the Appellants are entitled to have repetition of the purchase price paid by them, and they ought to be admitted as creditors accordingly.

Your Lordships will observe that those two pleas are both of them in terms founded upon what is alleged in the condescendence, and I have already referred to what is alleged in the condescendence, and submitted to your Lordships that it does not found a case for relief against Messrs. *Lawson & Son.*

My Lords, to what I have said I have very little more to add; but I must call your Lordships' attention to another circumstance connected with the case. On the materials before your Lordships I own that it appears to me that if there were not those objections to the claim of the *Phosphate Company* to which I have already referred, there would have to be considered another very serious objection arising from the delay which took place before any claim was made to rescind the contract in question. The contract is completed in the year 1871, I think in the month of May in that year; the claim to rescind it is made early in the year 1873. There are certain vague allegations as to the company's having been in ignorance; there is an allegation that what first came to their knowledge was a communication from the Government of *San Domingo,* which resulted in a notice or a threat to forfeit the concession. Now your Lordships find that from the middle of 1871, when the company was formed, when they either took possession or were entitled to take possession of the concession and the place where it was to be worked, until the date of this communication from the Government of *San Domingo*, the matter was in the hands of the *Phosphate Company* themselves. It was for them to take care that they kept alive the concession by exporting the necessary quantity of guano. There is no evidence that they might not have done so. There is no evidence whatever as to what the state of the island was or the quantity of guano or guanito that might have been obtained. In point of fact they did not, apparently, export the necessary quantity; but it would rather appear, from the communication to which I have referred from the Government of *San Domingo*, that their claim to forfeit the concession was as much for what had been omitted to be done after the concession came into the hands of the *Phosphate Company* as for anything that was omitted to be done before that time; and it would appear to me that the probability is that if the *Phosphate Company* had adhered to the terms of the concession from the time they came into possession, no forfeiture of the concession whatever as against them would have been made.

But, my Lords, I want to know what is the justification given for the delay in making any claim? Everything which ought to have been known, or could have been desired to be known, with regard to the subject-matter, must have been in the hands of the agents of the *Phosphate Company* from the time that company was formed. The documents are alleged by the bill to have been handed to the agents of the *Phosphate Company*. Now, my Lords, it has been said at your Lordships' Bar, No doubt the agents of the *Phosphate Company* knew this—the directors and the secretary and the other officers knew it; but (it is said) they were all more or less implicated in what has been termed the conspiracy, the scheme to defraud the company at large. My Lords, I find in the condescendence no allegation whatever of that kind, and I find upon this condescendence a perfect blank as regards any explanation of the delay between the middle of the year 1871, when the company was formed, and the beginning of the year 1873, when the claim to rescind this contract was made. Perhaps it is not necessary to ground any decision upon this delay, but, if it were necessary, it appears to me that the delay alone would be fatal to the case of the Appellants.

My Lords, I have endeavoured to avoid even the appearance of expressing any opinion whatever upon the litigation which has been proceeding in the Court of Chancery in *England*. That litigation is not in any way before your Lordships. We are called upon to pronounce an opinion upon the proceedings in *Scotland*, and upon those proceedings only. I say so because your Lordships were informed by the learned counsel at the Bar that the proceedings in *England* are not yet terminated, but are, at all events in some respects, the subject of a rehearing or appeal. It is, therefore, most important that your Lordships should not be supposed, upon pleadings and evidence which is not before you, to give any opinion which might lead to misapprehension and misconstruction elsewhere. The opinion which I have ventured to express is formed upon the Scotch pleadings in the sequestration and upon the evidence taken in *Scotland*, and upon that alone.

The advice which I shall offer to your Lordships is to affirm the interlocutors here complained of, and to dismiss the present appeal with costs.

LORD CHELMSFORD :—

My Lords, agreeing entirely with all that has been said by my noble and learned friend, the few observations which I propose to add will relate solely to the question as to the refusal to sist the proceedings by the Court of Session.

The Appellants, the *Phosphate Company*, proceeded under the Scotch sequestration to make a claim of a debt from the bankrupts' estate upon the ground of their being liable to damages for being parties to a fraudulent transaction by which the company were deceived into purchasing a worthless concession of a guano island in *San Domingo*. The trustee decided against the claim (1). The Appellants appealed in regular course against the decision. The Court of Session considered all the circumstances of the transaction, and exonerated the bankrupts from being implicated in the fraud, and affirmed the trustee's deliverance.

The Appellants assert that, the Court of Session being informed that there was a proceeding in Chancery in *England* to rescind the sale and to make the bankrupts and others liable in damages to the whole extent of the purchase-money, the Court of Session ought to have sisted the proceedings until the determination of the Chancery suit. The Appellants hardly go the length of saying that the Court of Session was bound to sist the proceedings; but only that they should, in the exercise of a just and proper discretion, have done so. But, the Court having regular possession of the proceedings, there was no reason why they should hold their hands until it should be known how the English Court would deal with the suit before it. They were competent to decide whether the trustee had properly rejected the claim, and, fully examining the evidence and all the circumstances, they determined that if there had been a fraud committed, there was no evidence to shew that Messrs. *Lawson* were implicated in it, in which I think they came to a right conclusion. This certainly constituted a sufficient reason against remitting the case to another *forum*, and for affirming the deliverance of the trustee.

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(1) Under the Act of 19 & 20 Vict. c. 79.

LORD SELBORNE :—

My Lords, I am of the same opinion.

I take it to be quite clear that the Scotch jurisdiction in a Scotch bankruptcy is exclusive, and that when in an Act of Parliament provision is made, as it is made, for establishing claims, upon which the dividends cannot yet be uplifted according to law, that must *primâ facie* mean according to the due course of law as that would be understood in the Courts of *Scotland*. I am far from saying that there might not be cases imagined in which, from the nature of the subject in litigation, or other circumstances, a proceeding in a foreign Court might be regarded by the Courts in *Scotland* as a satisfactory way of ascertaining the legal rights of parties; as for example when, according to the nature of the contract between them, some foreign law was to determine those rights, it might in that case well be considered that the country whose law was in question would in its own Courts be best able to inform the Courts in *Scotland* of the proper application of their law to the facts of the case. Again, if a claim dependent upon a joint cause of action only against a bankrupt in *Scotland*, and other persons who were in *England*, and if there were pending a suit or action in *England* against those joint parties, some of whom would not be amenable to the Scotch jurisdiction, I am not prepared to say that the Scotch Courts might not be proceeding in a very proper manner in desiring to see what the result of that action might be before proceeding themselves to determine the claim. But in any case, even if that course should be taken, and properly taken, the ultimate determination of the claim, with or without the benefit of the materials afforded by the adjudication of a foreign Court, must be with the proper *forum* of bankruptcy in *Scotland*. At the most, therefore, it can be no more than a question of judicial discretion; and for my part I think the proposition one very difficult to follow which the Appellants are obliged to advance, and which really is this: that where the demand, though several against the Scotch bankrupts, is made in respect of transactions in some of which they and others are implicated, and in others of which others perhaps and not they are implicated, but which are such as may be considered as against all the parties concerned in them, by an English Court, in an English Chancery suit, that on account of the very intricacy and number of the questions which from the nature and from the proceedings in the Court of Chancery in *England* may be combined in one suit, for that very reason it is more consistent with justice in a Scotch bankruptcy to sist the proof there until all the questions in the English Chancery suit against all the parties to that suit shall have been determined.

Now I will not undertake to say that no case may exist in which the Court of Session in *Scotland*, exercising a judicial discretion, might think fit to take that course; but I do say, that it is a proposition by no means self evident, and not commending itself to my reason that on those principles of judicial discretion, as to which it is a miscarriage of justice not to follow them, the Court in *Scotland*, being informed that there is a Chancery suit pending in *England* against the trustee of a Scotch bankruptcy and a dozen or twenty other persons, involving such a number of issues as were in question here, are to delay the administration in bankruptcy as between all the persons interested in that administration in *Scotland* until that English suit has been brought to its conclusion. Happily we live in times in which, even if that proposition were advanced, it might still be hoped that the delay might not be more than two or three years, or perhaps four or five, if the matter were ultimately brought to this House for determination. But we all know that, if a proposition be sound in point of law, it must have been equally as sound thirty, or forty, or fifty years ago as it is at the present time; and I need not remind your Lordships of the length and nature of the delay which might have occurred in the winding-up of a Scotch bankruptcy if such proceedings had occurred then.

My Lords, I do not say that the Court of Session in *Scotland* might not, if they had thought fit, have delayed this proof, but in the exercise of such discretion as they have, they determined not to do so. They determined that the merits should be gone into upon regular pleadings and regular proofs before them, which has been done; and I can hardly conceive a greater miscarriage of justice than it would be, if, after a complete suit has been instituted and fought out to the end on pleadings and proofs in *Scotland* for the purpose of determining this question between these parties, your Lordships were now to turn round upon a point of discretion and to say, All that is to go for nothing; there ought to have been a sisting of the proceedings in the Court of Session: the Court of Session must take into consideration what has been done in the English suit; after being informed of the decision of English Courts, which perhaps have not yet considered that suit, and ascertained whether or no those proceedings are final, they must then determine whether or not they are to bind them in *Scotland*, and whatever may be the result of any such consideration, all that has yet been done in *Scotland* is to go for nothing. My Lords, I am happy to find that none of your Lordships are of opinion that it is our duty to take that course. Then I come to the case upon the merits, and I entirely agree with your Lordships that we must deal with the facts before your Lordships *secundum allegata et probata*, as we find them upon this record. I am bound to say that, looking at the long inventory of the evidence, including a great number of documents which it has not been thought necessary to print in the printed case or appendix, I see no reason to suppose that there was any lack of materials before the Court in *Scotland* for the necessary purposes of justice.

Well, then, what is the case? The case, stated at the highest, is one of fraud. Now supposing fraud were established *primâ facie* upon this evidence against other persons, and not against the *Lawsons*, could your Lordships come to the conclusion that the *Lawsons* were to be answerable for the fraud of others, unless they appeared to have personally derived a profit or benefit from that fraud? My Lords, I know of no principle on which, in a Court of Equity or in a Court administering equity, such a conclusion could be arrived at upon the facts of this case. It appears to me that, if there was any fraud, the *Lawsons* are not shewn to have participated in it or to have derived any benefit from it.

My Lords, I do not inquire what may be the rights of the

H. L. (Sc.)
1876
PHOSPHATE SEWAGE COMPANY
v.
MOLLESON.

parties in any other point of view than that which is raised by this condescendence; but I do say that, under these circumstances, it is impossible that a case of repetition can be made upon the footing of failure of consideration and disappearance of the subject matter of the contract.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Agent for the Appellant: *John Holmes.*
Agents for the Respondent: *Laurence, Plews, Boyer, & Baker.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1876
May 30.

2 P.D. 57
6 App Cas 219.
8 P D 218

CLYDE NAVIGATION COMPANY . . APPELLANTS;
BARCLAY *et al.* . . . . RESPONDENTS.

Shipowner's Immunity under Licensed Pilotage.

Where a ship is under the compulsory charge of a licensed pilot the owners are not responsible for damage occasioned by his fault or incapacity; although they must meet and rebut any relevant allegation of negligence on their own part.

Per LORD CHELMSFORD:—Under the *Merchant Shipping Act*, 1854, where shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, they must be held to have satisfied the condition on which their exemption from liability depends; and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the damage.

Per LORD SELBORNE:—When it is proved that a qualified pilot was acting in charge of the ship, that that charge was compulsory, and that it was the pilot's fault or incapacity which occasioned the damage; the burden of proving the Defenders' contribution to the loss is cast on the Pursuers. The Defenders are not obliged to exonerate themselves by indefinite negation. They are, however, bound to rebut evidence actually brought against them of contributory negligence.

BY the *Merchant Shipping Statute*, 1854 (17 & 18 Vict. c. 120), s. 388, it is enacted that no owner or master of any ship shall be answerable for any loss or damage occasioned by the fault or incapacity of any licensed pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law.

H. L. (Sc.)
1876
Clyde Navigation Company v. Barclay.

Under the *Clyde Navigation Consolidation Act*, 1858, s. 128, a board was established for licensing pilots to navigate vessels plying on the river; and it was ordered that no one should presume to pilot any ship or vessel exceeding 60 tons register other than pilots duly licensed by the board.

On the 19th of February, 1873, one of the above Appellants' dredgers (of great value, known as dredger No. 3), moored in the *Clyde*, was run into by the Respondents' new ship *Colina*, of 2001 tons burthen, then on her trial-trip in the river. Serious damage arose; and the action in the present case was brought to recover £6000 in respect of the loss.

The defence was that the collision arose from no fault of the Respondents or of their crew; but was occasioned entirely by the incapacity or error of the licensed pilot who had charge of the *Colina*, and whose authority was imperative in the *Clyde* district under the *Merchant Shipping Act*, 1854.

The Appellants denied that the collision was caused by any fault of the licensed pilot, and they further asserted that the Respondents themselves had contributed to the accident by the inattention and disobedience of the crew to the orders and directions of the licensed pilot, whom they were bound to obey. Much evidence was adduced on both sides; and the result was, that the Lord Ordinary (1) assoilzied the Defenders (the above Respondents), and the Inner House (Second Division), Lord *Ormidale*, dissenting, adhered to the Lord Ordinary's interlocutor, holding that no blame attached to the master or crew of the *Colina*, and that the accident was exclusively attributable to the licensed pilot in charge of her (2).

The *Clyde Navigation Company* thereupon appealed to the House, having for their counsel Mr. *Cotton*, Q.C., and Mr. *Benjamin*, Q.C., who contended that there was no sufficient evidence of fault or incapacity on the part of the pilot, and that the officers and crew had failed in adequately obeying his orders and directions.

(1) Lord *Mackenzie*.

(2) 4th Series Scotch Cases, vol. ii. p. 842.

Mr. *Butt*, Q.C., and Mr. *Herschell*, Q.C., were heard for the Respondents.

The following opinions were delivered by the Law Peers:—

LORD CHELMSFORD:—

My Lords, the only question upon which there is any dispute in this case is, whether the owners of the *Colina* have done, or omitted to do, any act which contributed to the collision for which they are sought to be made answerable. Their defence is founded on the *Merchant Shipping Act*, 1854, which enacts that

> No owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

But although an accident may have been attributable originally to a pilot, yet, if any fault of the owner or master of the vessel has contributed to it, his responsibility still remains.

There has been some little confusion in the cases as to the *onus probandi*. In a case relied upon in the judgment of the Court below, and mentioned in the argument at the Bar—the case of *The Iona* (1)—Vice-Chancellor *Kindersley* is reported to have said:

> It is not enough for the owners to prove that there was fault or negligence in the pilot. They must prove to the satisfaction of the Court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage.

The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If, instead of saying "they must prove," &c., he had said, "it must be proved that there was no fault on the part of the officers and crew," he would then have been perfectly correct.

The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must therefore, in absence of proof of contributory fault of the crew, be held to have satisfied the condition

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(1) Law Rep. 1 P. C. 426; *Maclachlan* on Merchant Shipping, p. 269.

432.

H. L. (Sc.)
1876
Clyde Navigation Company v. Barclay.

on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out; and it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the accident.

There are certain facts which are clear in this case. The *Colina* was under the compulsory charge of *Skelly*, a licensed pilot, and he was the main cause of the damage which occurred, which is attributable to his improper steering of the vessel at the critical time when danger was imminent, when he appears not to have had complete command of himself. The original cause of the accident is beyond a doubt. Is the pilot then alone responsible, or were there any acts or omissions which contributed to the accident attributable to the owners or the crew of the *Colina?* This vessel had just been built, and had not been delivered by the shipbuilders to the owners, but was upon her trial trip on the *Clyde*, having on board three persons who afterwards became the master and the first and second mates, and a crew employed for the occasion consisting of twenty-five men. The first act of contributory negligence imputed to the owners is the having a crew of this description, and the bye-laws of the *Clyde Pilot Board* are referred to, and the evidence of *Skelly* the pilot.

The bye-laws require that:

> All steam vessels must be supplied with a captain or sailing master, who shall be an experienced seaman; and must also be manned with a sufficient number of able-bodied and experienced seamen for the safe navigation of the vessel.

The Judges who were in favour of the Defenders spoke disparagingly of this state of things. The Lord Justice Clerk says (1):

> The vessel was still the property of *Barclay, Curle, & Co.*, and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the bye-law. I think it was a slovenly state of matters, and not one to be commended.

And Lord *Ormidale* says (2):

> The evidence shews that the *Colina* was, as regards her officers and crew, in

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(1) 4th Series, vol. ii. p. 845.

(2) 4th Series, vol. ii. p. 847.

a very deplorable condition—so much so that it is not in the least surprising that an accident occurred.

With respect to the bye-law one can only observe that it was totally inapplicable to the present case. The *Colina* was still in the shipbuilder's hands, and therefore could not have any captain or sailing master, or an established crew of seamen. And this may account for what was observed by my noble and learned friend (1) in course of the argument, that no charge is made by the trustees of the *Clyde* navigation (the authors of the bye-laws) that there had been any fault by the non-observance of it. With respect to the constitution of the crew, it was necessarily one collected for the occasion, and could not consist of a master and officers strictly so called. There is no doubt that upon the trial trip of a vessel, although she cannot be officered and manned like a ship on a voyage, every provision must be made to navigate safely, and every precaution taken to avoid danger to other vessels. All that was necessary was that the pilot should be assisted by a sufficient crew to obey his orders and carry them out promptly and efficiently, and certainly so far as number is concerned there was a sufficient crew; for it appears that the *Colina* would, if properly manned, have a complement of sixteen men, whereas on the occasion of this trial trip there was no less a number than twenty-five. But, assuming any objection to arise from the constitution of the crew, the point to be established against the owner is, that the accident was occasioned in some degree by this circumstance.

It was said that the accident was partly owing to the want of proper assistance given to the pilot. It is said that the master ought to have been on the bridge to advise the pilot. There was no master, as I have already observed, strictly so called; but there is no magic in the word "master," and it appears that *Durie*, who was to be one of the officers of the *Colina*, was on the bridge, and did what was necessary. It is further objected that the chief officer was not at the bow to repeat the pilot's orders; and it is said that if the chief officer had been there, the hawser of the tug would have been sooner cast off. But *Skelly*, the pilot, says expressly that he did not want assistance for hailing the tug. He says, "I did not require any assistance in signalling the tug," and he says in another part of his evidence that all his orders were obeyed.

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(1) Lord *Selborne*.

Lord *Ormidale* (1) sums up his objections to the conduct of the owners as contributing to the accident in these terms:

> I am of opinion that, in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep a proper look-out, the Defenders have failed to exonerate themselves.

Now, with regard to "the failure to keep a proper look-out," there is not the slightest evidence that there was not a look-out kept. With respect to "want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect," it is already answered by the part of the pilot's evidence to which I have directed your Lordships' attention.

Under these circumstances I think your Lordships will be clearly of opinion that there is no ground for this appeal, and that the interlocutors appealed from ought to be affirmed.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion.

The law has been laid down, with, perhaps, a little want of his usual carefulness, by Vice-Chancellor *Kindersley* in the case of *The Iona* (2). I apprehend that the true rule, as was stated fairly enough by Mr. *Benjamin*, is that the mode of proof will be this: In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute; and the burden is, therefore, thrown upon you of proving that the mischief was occasioned by the pilot. But the other side may prove that, although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident.

The pilot seems evidently to have been assisted in every way. He says that every order he gave was attended to; there is no doubt about that, so that nothing whatever could be attributed to any defect on the part of those who were on board to assist him. Any danger or difficulty that did arise must have arisen from the unfortunately erroneous orders of the pilot. It seems to me, there-

(1) 4th Series, vol. ii. p. 842.

(2) Law Rep. 1 P. C. 426.

fore, that under all the circumstances there is no pretence for saying that the Defenders contributed to the injury complained of.

LORD SELBORNE:—

My Lords, I see no reason for inferring the existence of any special or peculiar principle applicable to the burden of proof in this class of cases.

Your Lordships will observe that there are three things necessary to be proved: first, that a qualified pilot was acting in charge of the ship: secondly, that that charge was compulsory; and thirdly, that it was his fault or incapacity which occasioned the damage.

I apprehend that if a Defender proves all these three propositions, and proves nothing more, then the burden is upon the Pursuer, not upon the Defender, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or shewed some incapacity, by which loss or damage were occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to shew that. I apprehend it is clear on general principle that the burden of laying that foundation rests upon the Pursuer, not upon the Defender. The Defender if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the Pursuer may discharge the *onus* lying upon him in that respect either by direct proof tendered by himself, or by shewing that in the proofs brought forward on the part of the Defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown upon the Defender to rebut the *primâ facie* evidence which has been given of contributory negligence on his part.

Whatever may be the precise expressions to be found in any of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which those expressions were used, for supposing that an arbitrary rule was meant to be laid down, inverting the general principles of *onus probandi* as applied to this particular class of cases. The Lord Justice Clerk seems to me to have expressed the matter very properly, with the exception perhaps of one single word, when he says:

> I should prefer to state the law to be, that it is not enough for the owners to shew that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master or crew (1).

I confess, my Lords, I should not have used that word "room," I should have used the word "ground;" and have said "if there is reasonable ground for saying that there was contributory fault on the part of the master or crew." The proof of circumstances which *primâ facie* shew such reasonable ground for saying that there was contributory fault on the part of the master or crew, no doubt would throw upon the Defender the burden of explaining those circumstances so as to satisfy the Court that in point of fact the *primâ facie* conclusion from those circumstances is not correct. If he fails to do that, he fails altogether. When the principles of law are correctly understood, there is no difficulty whatever in applying them to the facts of this case.

The question has ultimately turned upon the want of proper officers on board the ship. In the first instance the argument took perhaps a wider range, and it was said that the ship was not properly manned and officered; but ultimately it was reduced, and reference was made to the bye-laws issued for the navigation of the *Clyde*. After having studied those bye-laws, I must say that even if it were clear that they did apply to trial trips as well as to other occasions, in all respects, I am by no means satisfied that there is any proof whatever given in this case that they were not strictly complied with—substantially complied with, at all events.

My Lords, these bye-laws are two. The first is:

> Every vessel shall during the daytime have one person, and from sunset to sunrise, or in time of fogs, two persons properly qualified stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall be furnished with a trumpet, or horn, or whistle, to be used when there is reason to believe another vessel is near.

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(1) 4th Series, vol. ii. p. 845.

I do not know whether the words, "stationed at the bow," point to anything different from being stationed on the bridge; but in this case the evidence makes it quite clear that the proper place for the look-out was the bridge; and, as a matter of fact, the evidence is that this accident occurred during the daytime, when, according to that bye-law, one person only would be sufficient for the look-out; for there was plenty of light, and no fog. There was one person, the pilot, and another person, *Durie*, who practically acted as an officer, on the bridge the whole of the time, to say nothing of a third person, *Ferguson*, whom I will mention presently, who was there too, but who may not perhaps have been properly qualified. But that the pilot and *Durie* were properly qualified for this purpose is perfectly clear; they were in the proper place during the whole time, and there was a trumpet to give proper notice. Therefore, it seems to me that that bye-law, at all events, was duly complied with in this case.

The second bye-law is,

> Every steamer navigating the river shall be manned by an experienced captain or sailing master, and a sufficient number of able-bodied and experienced men, and shall in all cases have a person or persons stationed as a look-out, in terms of Article 2.

There was a person—in fact there were two persons—stationed as a look-out. It is not now denied that there were "a sufficient number of able-bodied and experienced men," because it is admitted that no case can be made of a want of a proper crew of seamen. The sole question, therefore, upon that bye-law would be reduced to this: was the requirement that every steamer should be "manned by an experienced captain or sailing master" duly complied with? My Lords, I venture to say that the pilot was the sailing master in this case; and if there be nothing more than the mere language of that bye-law, considered as applicable at all events to a trial trip, I cannot conceive any ground for saying that a pilot might not be a sufficient sailing master within the meaning of the bye-law. So much, my Lords, with regard to the bye-laws.

Now I come to the pleading; and it does seem to me that if ever there was a case in which the Pursuers were to be bound by the inferences to be drawn from their own pleadings, this is a case of that description. For who are these Pursuers? They are a public body who have made these bye-laws, a body expressly charged with the care of the navigation of the River *Clyde*. It is not alleged that they discovered after those pleadings were put in any fact which they did not know before. They knew, therefore, both what was usual in the case of trial trips, and what was reasonably to be required and expected, whether under their own bye-laws or otherwise, in respect of the officering and manning of the vessel. And knowing all the facts, they distinctly put upon the pleading this averment, that the accident was due to two causes, or to one or other of those causes, not alleging any other cause besides. Those two causes were, first,

> Negligence, or want of proper care and skill on the part of those navigating or steering the vessel:

That is one, and the other cause is,

> Gross and culpable defects in her construction and appareling, and in the hull, machinery, steering-gear, or other appliances.

Therefore they distinctly alleged two causes, one improper steering and navigation at the time; and the other improper construction and fitting up of the vessel itself. But there is a total absence of allegation either that the ship was improperly manned or not properly officered, or that the want of proper manning or proper officering had anything to do with the accident which occurred.

It is impossible, my Lords, for me to doubt that they would have alleged a want of proper manning and proper officering, if, when the pleadings were put in, they had taken that view of the subject, which in default of anything else to rely upon has been pressed on their behalf at the Bar. And when I look at the evidence, bearing in mind that such is the pleading of the Pursuers themselves, I cannot but come to the conclusion that if there were any doubtful points in the evidence, any ambiguous points, any room for the suggestion or possible inferences tending to the conclusion that the ship was improperly officered, all doubt and all ambiguity upon that subject ought to be removed when we bear in mind that those who best understood the matter and whose interest it was to suggest these objections, if there were any ground for them, have themselves made no such suggestion, and have shewn that they did not rely upon that view of the case.

H. L. (Sc.)
1876
Clyde Navigation Company v. Barclay.

My Lords, I think it would be most unreasonable to suppose that you should for a trial trip put on a crew and officers engaged and commissioned in the same way as when the ship is to be sent to sea; and this at a time when she is still only in the hands of the builders, when a temporary purpose is in view, and when she is not delivered over to those whose business it will be to engage the officers and the crew.

Your Lordships have this evidence, that the pilot was in sole charge; and I apprehend, in order to give the Defenders the benefit of the exemption under the statute, it was necessary that he should have been so; the pilot was in sole charge, but he had, as my noble and learned friends have pointed out, the assistance not only of a competent crew, and of four persons at the wheel (one of them a quartermaster), but also of *Durie* and *Corrigall*, who were in substance acting as officers though not having the engagements of officers at that time. Did they, or did they not, do all that was needful; and were they or were they not in such a position as to make it a right and a reasonable conclusion that the pilot had all the assistance which he could possibly require? My Lords, the pilot whose interest it was, as has been pointed out, rather to exonerate himself than otherwise, as the result of his evidence says that he has no reason whatever to doubt that all his orders were properly obeyed and attended to, and that he needed no assistance with which he was not provided.

Therefore, my Lords, I entirely agree that this appeal must be dismissed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agent for the Appellant: *W. A. Loch.*
Agents for the Respondent: *Grahames & Wardlaw.*

END OF VOL. I.

The Mode of Citation of the Volumes in the *Three Series* of the Law Reports, commencing January 1, 1876, will be as follows:—

In the First Series,
1 Ch. D.

In the Second Series,
1 Q. B. D. 1 Ex. D.
1 C. P. D. 1 P. D.

In the Third Series,
1 App. Cas.

INDEX.

AGENT—Contract to employ - - 256
See Contract to employ Agent.
—— Crown—Infringement of patent - 632
See Patent. 2.

ARREST OF SHIP—Salvage suit—Demurrage 58
See Salvage.

BANKRUPTCY—Proof against co-partner 195
See Proof against Co-partner.

BANNS—*Proclamation of Matrimonial Banns—Parish quoad sacra—Ministers and Elders.*] Regular marriages *in facie ecclesiæ* must be preceded by banns; the proclamation thereof being *inter sacra*, and forming part of the Church discipline; the civil power in this matter supporting the ecclesiastical authority.—Where a severed district has been constituted a parish *quoad sacra*, the proclamation of banns for those who reside in it must be pronounced in the church of the parish *quoad sacra*.—The ministers and elders of a *quoad sacra* parish "shall enjoy the status and the powers, rights, and privileges of a parish minister and elders of the Church of *Scotland*." Hutton *v.* Harper - - - H. L. (Sc.) 464

BEACH—Right to beach fishing boats - 456
See Harbour Toll.

BILL—Dismissal of - - - - 139
See Dismissal of Bill.

BILL OF EXCHANGE—Payable on demand 554
See Negotiable Security. 2.

BILL OF LADING—Liability of shipowner for damage - - - - 318
See Shipowner's Liability.

BOARD OF TRADE—Passenger traffic duty—Dispensing power - - - 146
See Passenger Traffic Duty.

BOMBAY CIVIL SERVICE FUND - - 281
See Civil Service Fund.

BRIDGE—Railway—Loading trucks too high
See Evidence of Negligence. [754

CANADA, LAW OF—*Expropriation—Action of Indemnity—Compensation—Closing one End of a Street not an Interference with the Rights of the Owners of Houses adjoining thereto—Art.* 407 *of the Civil Code of Canada*—27 *&* 28 *Vict. c.* 60 (*Canada*).] Declaration that Plaintiff had built eight houses fronting *St. F. Street*, which at one end opened into *B. Street*, and at the other into *St. J. Street*, and that these houses, being in immediate proximity to the *B. Station* of the *Grand Trunk Railway Company*, had acquired great value as boarding houses and shops; that the Defendant municipal corporation of the city, "without any previous notice to the Plaintiff, and without any indemnity previously offered to him, forcibly, illegally, wrongfully, *et par voie de fait* closed up *St. F. Street*, and built from the south end of his houses to the opposite side of the street a close wooden fence about fifteen feet in height"; that in consequence the street had "become a *cul de sac*, and the occupants of the houses had lost their natural means of egress and regress."—Pleas, that the Defendant corporation in closing the street had not committed "*un acte de violence et illégalité ou une voie de fait*"; that they had only exercised a privilege and used a power conferred upon them by their charter of incorporation, "*et qu'en exerçant ce privilége ils n'ont pas empiété sur la propriété du demandeur*"; that in the several Acts of Incorporation of the city the Legislature had specially designated the cases in which they were liable to indemnify individuals from the damages resulting from the exercise of their powers, that is to say: 1. *L'expropriation forcée*; 2. *Le changement de site des marchés*; 3. *Le changement de niveau des trottoirs*; that whilst acting within the limits of their powers they were not responsible for damage; and that the street "*n'a pas été obstruée en face des maisons ou de la propriété du demandeur, et ses locataires ont actuellement entrée et sortie par la dite rue.*"—It appeared that the corporation closed the street under the authority of a by-law made in pursuance of 23 Vict. c. 72; that the only effect of making the street a *cul de sac*, so far as the rights of access and passage are concerned (apart from the loss of customers), is that the Plaintiff's tenants have to go by other streets and

CANADA, LAW OF—*continued.*

CANADA, LAW OF—*continued.*
further to reach the southern part of the city. There was no evidence of special damage by reason of the loss of customers; nor of deprivation of light to an actionable degree:—*Held*, that assuming the Plaintiff to have rights in *St. F. Street* which had sustained damage, his property had not been invaded in a way to constitute "*une expropriation,*" nor had he established an injury which would give him a right to a previous indemnity under Art. 407 of the Civil Code, so as to make the corporation wrongdoers, and their act in closing the street a trespass and "*une voie de fait*" because such indemnity had not been paid. His claim (if any) should be prosecuted under the provisions of the Act relating to expropriations by the corporation (27 & 28 Vict. c. 60).—By the law of *France* the closing one end only of a street is not such an interference with the rights possessed by the owners of houses adjoining thereto of access and passage as will give a claim to compensation.—The special Acts relating to this corporation must be read in connection with 27 & 28 Vict. c. 60, which prescribes the particular mode in which the compensation payable to any party "by reason of any act of the council for which they are bound to make compensation" should be ascertained. But actions of indemnity for damage in respect of such acts are excluded by necessary implication; for they assume that the acts in respect of which they are brought are unlawful, whilst the claim for compensation under the statute supposes that the acts are rightfully done under statutable authority.—*Jones* v. *Stanstead Railway Company* (Law Rep. 4 P. C. 98) approved. Mayor, Aldermen, and Citizens of Montreal *v.* Drummond - - - **P. C. 384**

CAPIAS—Writ of—Law of *Nova Scotia* - 307
See Nova Scotia, Law of.

CARGO—Insurance—Passing of property - 713
See Insurable Interest.

CASES—*Cassilis Peerage Case* (Maidment's Report) commented on - - - 1
See Peerage.

—— *Charlotte, The* (3 W. Rob. 68) approved 58
See Salvage.

—— *Evangelismos, The* (12 Moo. P. C. 352; Swabey, 378) approved - - 58
See Salvage.

—— *Feather* v. *The Queen* (6 B. & S. 257) considered - - - - 632
See Patent. 2.

—— *Jones* v. *Stanstead Railway Company* (Law Rep. 4 P. C. 98) approved - 384
See Canada, Law of.

—— *Kirchner* v. *Venus* (12 Moo. P. C. 361) considered - - - - 209
See Policy on Freight.

CESSION OF BRITISH TERRITORY - 332
See Indian Law. 2.

CHARITY—Gift to charity which has ceased—*Cy-près*—Indian law - - 91
See Indian Law. 1.

CHEAP TRAINS—Passenger traffic duty - 146
See Passenger Traffic Duty.

CHURCHWARDEN—*Private Act—Common Law Rights—New Parishes.*] As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the Act is a private Act of Parliament, and though the particular custom may have been confirmed, years before, by a verdict in a Court of Law.—A parish consisted of four townships or hamlets, *D.*, *W.*, *M.*, and *B.* *D.* contained the parish church, and gave the name to the whole parish. One of the churchwardens of *D.* was appointed by the rector, the other was elected by the parishioners. The two persons who, in the township or hamlet of *M.*, performed the various duties of churchwardens and overseers, were elected by the inhabitants of *M.*, which hamlet raised and administered its rates quite independently of *D.*, and the churchwardens of *D.* proper never interfered, and this custom of election in *M.* by the inhabitants, had been confirmed by a verdict in a Court of Law many years ago. A private Act of Parliament was passed creating *D.* and *W.* into one parish, *M.* into another, and *B.* into a third. The Act contained a provision that when the three parishes had been constituted, the churchwardens of each should be chosen as those of *D.* had been chosen and appointed:—*Held*, that though there were no particular words in the Act expressly putting an end to the custom of the inhabitants of the hamlet of *M.* electing the churchwardens, there were words clearly directing something else to be done entirely inconsistent with that custom, which, therefore, on *M.'s* being constituted a parish, ceased, and the rector of the new parish of *M.* became entitled, as the rector of *D.* had always been, to appoint one of the churchwardens, while the other was elected by the parishioners at large, for that the Act had made *D.* the model on which the newly-created parishes were formed and were to be governed. Green *v.* The Queen - **H. L. (E.) 513**

CIRCUMSTANTIAL EVIDENCE—*Help afforded by opposing Criticism.*] Remarks of Lord *Cairns*, L.C., shewing that in considering circumstantial evidence *all* the circumstances must be examined and compared to establish the required elucidation.—In dealing with circumstantial evidence, the Court derives much aid from the opposing criticisms of counsel. Belhaven and Stenton Peerage [**H. L. (Sc.) 278**

CIVIL CODE OF CANADA, Art. 407 - 384
See Canada, Law of.

CIVIL SERVICE FUND—*Bombay Civil Service Fund—Statute of Limitations—Interest—Trustees.*] A fund was established at *Bombay* by the covenanted civil servants of the *East India Company* serving in that Presidency, for granting pensions and annuities to members, their widows and children. By the original articles certain persons were appointed managers, and they were declared to be "the trustees of the Fund," and the property was vested in them:—*Held*, that they were not mere trustees for the association, but "trustees" properly so called, and that the members of the fund were the beneficiaries, so that the defence of the *Statute of Limitations* could not be set up against a claimant on the Fund, merely on account

CIVIL SERVICE FUND—*continued.*

of lapse of time.—There was a rule of the institution that required a claim to be made and particulars of the claim to be fully stated :—*Held*, that, till such claim was made as required, the trustees did not come under any liability.—Payments were to be made annually to certain persons who were entitled to annuities chargeable on the Fund :—*Held*, that where such persons had, by their own conduct, occasioned the non-payment of the annual sums, they were not entitled to interest on those sums for the time during which they had so occasioned the non-payment.—A fund was provided for the maintenance of the widows and children of members of an association, and one of the rules was that there should be an allowance to a widow of £300 a year, but that if she possessed property exceeding £200 a year independent of the institution, the allowance should be reduced in such amount as her property might exceed that sum, so that her pension, together with her property, should not exceed £500 a year. A member of the Fund left a widow and daughter; he bequeathed to his daughter a sum of £6000, with a direction that the income should be paid to the widow till the daughter came of age. When the daughter did come of age, the widow claimed to receive the difference which she had lost by the happening of that event, so as to bring up her income to £500. The trustees of the Fund declined to recognise this claim, asserting that when a bequest was made by a member of the Fund, the property left should be considered as the property of the widow and family collectively :—*Held*, that this decision of the trustees was incorrect, and that the widow was entitled to have the deficiency in her income (occasioned by her daughter becoming absolutely entitled to the bequest), made up to her out of the Fund.—Other resolutions were afterwards agreed to by which additional benefits were to be given to widows and children of members of the Fund, the members being allowed an option to perform or decline the conditions on which such benefits were offered. A member accepted his annuity under the original regulations, but did not then, or at any time during his life, perform or offer to perform these new conditions. Some years after his death his widow declared her readiness to perform them, and claimed the additional benefits thereby to be obtained :—*Held*, that she was not entitled to make this claim. Edwards *v.* Warden [H. L. (E.) 281

CLAIM—Gold field—Ownership of claim - 595
See Queensland, Law of.

COLONIAL LAW—*India* - - 91, 332
See Indian Law. 1, 2.

—— *Lower Canada* - - - - 384
See Canada, Law of.

—— *New South Wales* - - - 82
See New South Wales, Law of.

—— *New Zealand* - - - - 707
See New Zealand, Law of.

—— *Nova Scotia* - - - - 307
See Nova Scotia, Law of.

—— *Queensland* - - - - 595
See Queensland, Law of.

—— *Victoria* - - - - - 39
See Victoria, Law of.

COMMISSIONERS—Public works loan - 611
See Public Works Loan.

COMPANY—Shares—Forfeiture—Law of *Victoria*
See Victoria, Law of. [39

COMPENSATION—Closing end of street—Law of *Lower Canada* - - - 384
See Canada, Law of.

—— Endowed School Act - - - 68
See Endowed Schools Act.

COMPULSORY PILOTAGE — *Shipowner's Immunity under Licensed Pilotage.*] Where a ship is under the compulsory charge of a licensed pilot the owners are not responsible for damage occasioned by his fault or incapacity; although they must meet and rebut any relevant allegation of negligence on their own part.—*Per* Lord *Chelmsford*: Under the *Merchant Shipping Act*, 1854, where shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, they must be held to have satisfied the condition on which their exemption from liability depends; and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the damage.—*Per* Lord *Selborne:* When it is proved that a qualified pilot was acting in charge of the ship, that that charge was compulsory, and that it was the pilot's fault or incapacity which occasioned the damage; the burden of proving the Defenders' contribution to the loss is cast on the Pursuers. The Defenders are not obliged to exonerate themselves by indefinite negation. They are, however, bound to rebut evidence actually brought against them of contributory negligence. Clyde Navigation Company *v.* Barclay H. L. (Sc.) 790

CONSERVATORS OF THAMES - - 662
See Riparian Owner.

CONSIDERATION—Sale of bills for abroad 554
See Negotiable Security. 2.

CONTEMPT—Default of Plaintiff - - 139
See Dismissal of Bill.

CONTRACT—Partnership—No date or duration
See Partnership at Will. [174

—— Plans and specifications - - 120
See Implied Warranty.

—— To employ agent—Sale of subject of agency
See Contract to employ Agent. [256

CONTRACT TO EMPLOY AGENT — *Contract—Agency—Control over Property—Principal—Sale of the Subject of the Agency.*] Where two parties mutually agree, for a fixed period, the one to employ the other as his sole agent in a certain business, at a certain place, the other that he will act in that business for no other principal at that place, there is no implied condition that the business itself shall continue to be carried on during the period named.—*A.* and *B.* agreed "in consideration of the services and payments to be mutually rendered," that for seven years, or as long as *A.* should continue to carry on business at the town of *L.*, *A.* should be the sole agent at *L.* for the sale of *B.*'s coals, and that *B.* would

CONTRACT TO EMPLOY AGENT—*continued.*
not employ any other agent at *L.* for that purpose. There were stipulations in the agreement that *B.* should have the entire control over the prices for which, and the credits at which the coals were to be sold; and that if *A.* could not sell a certain amount per year, or *B.* could not supply a certain amount per year, either party might, on notice, put an end to the agreement. At the end of four years, *B.* sold the colliery itself. In an action by *A.* for damages for breach of the agreement thereby occasioned:—*Held*, that the action was not maintainable; for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to *L.* RHODES *v.* FORWOOD - - H. L. (E.) 256

CONTRIBUTORY NEGLIGENCE—Railway company - - - - - 754
See EVIDENCE OF NEGLIGENCE.

COSTS—Lords equally divided - - 713
See INSURABLE INTEREST.

—— Trustees - - - - - 428
See TRUST FOR SALE.

CROWN—Prerogative of—Cession of territory 332
See INDIAN LAW. 2.

—— Right to use patented invention - 632
See PATENT. 2.

CROWN LANDS—Application for—*New Zealand* [707
See NEW ZEALAND, LAW OF.

CROWN LANDS ALIENATION ACT, 1861—*New South Wales*—Grant to infant - 82
See NEW SOUTH WALES, LAW OF.

CY-PRÈS—Doctrine of—Gift to charity which has ceased - - - - 91
See INDIAN LAW. 1.

DELAY—Claim against shipowner - - 318
See SHIPOWNER'S LIABILITY.

DEMURRAGE—Arrest of ship—Salvage suit 58
See SALVAGE.

DESCENT—Scotch earldom - - - 1
See PEERAGE.

DISCOVERY—Refusal of, by Plaintiff - 139
See DISMISSAL OF BILL.

DISCOVERY OF GOLD—*Queensland*—Ownership of claim - - - - 595
See QUEENSLAND, LAW OF.

DISMISSAL OF BILL—*Practice.*] The Court of Chancery has not only full power to stay all proceedings in a suit till the Plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself; and where money has been paid into Court, may direct the payment of that money out of Court to the party entitled to it.—*Per* Lord *Hatherley:* When any step ought to be taken in a cause, which, in the judgment of the Court, is necessary in order to facilitate the decision of the cause, and default is made, the party in default, if Plaintiff, is liable to have his bill dismissed. And this is not a matter of first impression. REPUBLIC OF LIBERIA *v.* ROYE - H. L. (E.) 139

DRAFT—Bill payable on demand—Stamp 554
See NEGOTIABLE SECURITY. 2.

EARLDOM.
See PEERAGE.

ENDOWED SCHOOLS ACT, 1869, ss. 13, 39—*Vested Interest of Petitioner—Compensation.*] The Appellant, as Master of *Alleyn's College of God's Gift*, at *Dulwich*, held an office created and defined, both as to its value and duties, by 20 & 21 Vict. c. 84. The Act provided for his dismissal from office by a certain majority at a meeting constituted and convened in a particular manner, of the governors of the college; no such meeting ever having at the date of appeal been convened, and no such majority having at that date ever had existence. In a petition presented under sect. 39 of the *Endowed Schools Act*, 1869:—*Held*, that the Appellant had a vested interest in his office and the emoluments thereof within the meaning of the 13th section of the *Endowed Schools Act*, 1869, which interest must, under the said section, in any scheme by the Charity Commissioners relating to the college, be saved or duly compensated for. As it appeared that such interest had neither been saved nor duly compensated for, it was ordered that the scheme should be remitted to the Commissioners, with costs to be paid out of the funds of the endowment. *In re* ALLEYN'S COLLEGE, DULWICH P. C. 68

ENGINEERING CONTRACT—Plans and specifications - - - - - 120
See IMPLIED WARRANTY.

ENTRY—Forcible - - - - 414
See FORCIBLE ENTRY.

EVIDENCE—Circumstantial - - 1
See PEERAGE.

—— Circumstantial - - - - 278
See CIRCUMSTANTIAL EVIDENCE.

—— Marriage—*Scotland* - - - 686
See EVIDENCE OF MARRIAGE.

—— Negligence - - - - 754
See EVIDENCE OF NEGLIGENCE.

EVIDENCE OF MARRIAGE—*Scotch Doctrine of Habit and Repute as to Marriage.*] *Per* Lord *Selborne:* Habit and repute is not a mode of constituting but of proving a marriage; and when a true and undivided habit and repute is shewn, a presumption of the marriage arises by the Law of *Scotland.*—*Per* Lord *Cairns*, L.C.: The presumption of marriage is much stronger than the presumption in regard to other facts.—When a matrimonial ceremony took place in *Scotland*, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife, and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration.—It must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract.—The *onus* of rebutting a marriage

EVIDENCE OF MARRIAGE—*continued.*
by habit and repute is thrown on those who deny it.—*Per* Lord *Chelmsford:* The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent. De Thoren *v.* The Attorney-General - H. L. (Sc.) 686

EVIDENCE OF NEGLIGENCE — *Contributory Negligence—Misdirection.*] Though a Plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the Defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the Plaintiff's negligence will not excuse him.—A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The Judge at the trial told the jurors that the Plaintiffs must satisfy them that the accident happened solely through the negligence of the Defendants' servants, for that if both sides were negligent, so as to contribute to the accident, the Plaintiffs could not recover:—*Held,* a misdirection, and a new trial ordered. Radley *v.* London and North Western Railway Company H. L. (E.) 754

EXECUTOR—Power to reserve fixtures—Scotch lease - - - - - 762
See Scotch Lease.

EXPROPRIATION—Law of *Lower Canada* 384
See Canada, Law of.

FIRE POLICY—*Ship—Usage.*] A time policy against fire was effected on a steam-ship. The policy described it as then "lying in the *Victoria Docks,*" but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was *Lungley's Dock,* at some distance up the river. To go there it was necessary to remove the paddle-wheels; they were removed in the *Victoria Docks,* and the ship was then towed up to *Lungley's Dock.* The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the *Victoria Docks,* but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—*Held,* that the policy covered the ship while in the *Victoria Docks,* and while passing from them to the dry dock, and while directly returning from the dry dock to the *Victoria Docks;* but did not cover the vessel while moored in the river for a collateral purpose.—*Per* Lord *Chelmsford:* An insurance against fire necessarily has regard to the locality of the subject insured.—*Per* Lord *O'Hagan:* To construe the policy as allowing the vessel to remain in the river while the paddle-wheels were replaced, would be to add a new condition to the policy, which could not be done. Pearson *v.* Commercial Union Assurance Company [H. L. (E.) 498

FISHING BOATS—Right to beach in winter 456
See Harbour Toll.

FIXTURES—Attached to leasehold—Scotch lease
See Scotch Lease. [762

FORCIBLE ENTRY—15 *Ric.* 2, *c.* 2—*Mortgagee in Fee.*] Where a person having the legal title to land is in actual possession of it, the attempt to eject him by force brings the person who makes it within the provisions of the statute against forcible entry—It will do so though the possession of the person having such legal title has only just commenced, though he may himself have obtained it by forcing open a lock, though his ejection has not been made by a "multitude" of men, nor attended with any great use of violence, and though the person who attempts to eject him may even set up a claim to the possession of the land.—*L.* became the mortgagee in fee of certain premises of which it appeared that he did not at once take actual possession. The mortgagor, whose possession had not been interfered with, made an agreement with *T.* and *W.* to allow them (at a rent) the use of these premises, and for some little time *T.* and *W.* did have the use of them and deposited goods there. On one morning at an early hour *L.,* without notice to any one, went accompanied by a carpenter and another man, and, by taking off the lock of the outer door, entered into actual possession. *T.* and *W.* hearing of this went to eject him, and not being able to get in at the door obtained an entrance through a side window, then came down and did eject *L.* On this *L.* indicted them for a forcible entry; they were acquitted, jointly paid their attorney's bill, and then brought a joint action against *L.* for malicious prosecution without reasonable and probable cause:—*Held,* that, on these facts, they could not sustain the action, and that *L.* was entitled to have the verdict entered in his favour. —*Quære,* whether a joint action by *T.* and *W.* could in such a case have been maintainable. —*Per* Lord *Selborne:* If for civil purposes the legal possession was then in *L.,* the foundation for a charge of forcible entry, so far as possession is concerned, was sufficiently established. Lows *v.* Telford - - - - H. L. (E.) 414

FOREIGN COURT — Pending decision—Staying proceedings in meantime - - 780
See Staying Proceedings.

FOREIGN LOAN—Scrip - - - 476
See NEGOTIABLE SECURITY. 1.

FORFEITURE OF SHARES—Law of *Victoria* 39
See VICTORIA, LAW OF.

FREIGHT—Insurance of - - - 209
See POLICY ON FREIGHT.

GOLD FIELDS—*Queensland*—Ownership - 595
See QUEENSLAND, LAW OF.

GRANT—Crown lands—Infant - - - 82
See NEW SOUTH WALES, LAW OF.

—— Reservation of minerals - - 761
See MINERALS.

HABIT AND REPUTE—Presumption of marriage
See EVIDENCE OF MARRIAGE. [686

HARBOUR TOLL—*Harbour—Beaching of Fishing Boats in Winter—Efficacy of a Local Act.*] Where the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, and where the proprietor had subsequently obtained a local Act authorizing his levy of five shillings yearly for each boat beached, the fishermens' right were enforced against him; and it was *held*, that he could not exclude the fishermen from the ground used for beaching without assigning to them other ground equally well adapted for the purpose.—A local Act of Parliament must be judicially noticed, and must have all the operation of a public statute.—When an Act authorizes the exaction of a toll, the accommodation for which the toll is authorized must be provided. AITON *v.* STEPHEN H. L. (Sc.) 456

HEIR MALE—Presumption in favour of - 1
See PEERAGE.

HERITABLE PROPERTY—Scotch lease - 762
See SCOTCH LEASE.

HUSBAND AND WIFE—Banns - - 464
See BANNS.

—— Evidence of marriage—Scotch law - 686
See EVIDENCE OF MARRIAGE.

IMPLIED WARRANTY—*Contract—Plans and Specifications—Tenders.*] Where plans and a specification, for the execution of a certain work, are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification.—The contractor for the work cannot, therefore, sustain an action for damages, as upon a warranty, should it turn out that he could not execute it according to such plans and specification.—*T.* contracted with the Defendants to take down an old bridge and build a new one. Plans and a specification prepared by the Defendants' engineer were furnished to him, and he was required to obey the directions of the engineer. The descriptions given were stated to be "believed to be correct," but were not guaranteed; and, in one particular matter at least, he was warned to make examination for himself. Part of the plan consisted in the use of caissons. These turned out to be of no value, and the work done in attempting to use them was wholly lost, and the bridge had to be built in a different manner. In this way much labour and time were wasted. The contract contained provisions as to the payment for extra work, and that work had (with the contract work) been duly paid for. The contractor sought for compensation for his loss of time and labour occasioned by the failure of the caissons, and in his declaration alleged that the Defendants had warranted that the bridge could be inexpensively built according to the plans and specification. There was no express warranty to that effect in the contract:—*Held*, that none could be implied.—*Semble*, that if he had any remedy under these circumstances it was not in an action for damages as for breach of warranty, but for compensation as upon a *quantum meruit*. THORN *v.* MAYOR AND COMMONALTY OF LONDON - - - - H. L. (E.) 120

INDIAN EVIDENCE ACT, 1872, s. 113 - 332
See INDIAN LAW. 2.

INDIAN LAW—*Will—Gift to Charity which has ceased to exist—Application of Cy-près Doctrine, when the Residuary Bequest is also to Charity.*] *C. B.*, a Frenchman, by an English will, dated the 1st of January, 1801, bequeathed his property, valued by himself at upwards of 30 lacs, partly to individual legatees, more largely to various charitable objects, the most prominent being certain establishments in *Lucknow*, *Calcutta*, and *Lyons*. His estate was administered and various questions under his will disposed of in several suits instituted for those purposes in the Supreme Court at *Calcutta*. Among the charitable bequests were the three following legacies; 1, by the 28th clause the annual sums of Rs.5000 and Rs.1000 to be applied respectively to the discharge and relief of poor debtors detained in prison in *Calcutta*; 2, by the 25th clause the annual sum of Rs.4000 to be paid to the magistrates of *Lyons* to liberate poor prisoners detained for debt in *Lyons*. This fund was, before 1832, fully paid over to the Mayor and Commonalty of *Lyons*. 3. By the 33rd clause the annual sum of Rs.4000, to be paid to liberate poor prisoners at *Lucknow*, but with a direction that "if none, that sum is to remain to the estate." This gift was, by a decree of the Supreme Court in 1832, declared to be void, and the residuary estate was increased by the amount which would have been required to satisfy it.—A scheme was settled in 1802 for the administration of the charities for the release and relief of poor prisoners at *Calcutta* comprised in the first-mentioned legacy, and funds to satisfy the same were, by orders of the Supreme Court, transferred to the credit of two separate accounts for those several purposes. The income of these funds in excess of what was required for poor prisoners at *Calcutta* accumulated; and in August, 1865, had amounted to Rs.351,000. The residuary clause of the will (the 33rd) directed that "after the several payments of gift and others, as also the several establishments, if a surplus of ten lacs remains, that above surplus is to be divided in such a manner as to increase the three establishments."—On a petition by the Advocate-General, without citing the Appellant, the High Court on the 3rd of August, 1865, made an order (confirmed by another order of the 2nd of March, 1866), under which a sum of Rs.150,000 was reserved in an

INDIAN LAW—*continued.*

account for the relief and release of poor prisoners at *Calcutta* as above, the income to be applied on the *cy-près* principle "in lieu and supersession of the former schemes;" and the residue of the said accumulation was divided between the *Calcutta* and the *Lucknow Martinière* establishments.—On a petition by the Appellant to the High Court, dated the 21st of June, 1873, praying that it might be declared that the said gifts of Rs.5000 and Rs.1000 annually for the release and relief of prisoners in *Calcutta* had failed; that the said accumulations formed part of the residue of the testator's estate; and that the Petitioner, as a residuary legatee, was entitled to a share thereof: the High Court refused the petition, holding, "that the said charitable gift was an absolute charitable gift capable of being applied *cy-près;* and that the Petitioner, as one of the residuary legatees under the will, was not entitled to any of the funds appropriated to that gift":—*Held*, by their Lordships, that this order must be affirmed.—It cannot be laid down as a general principle that the *cy-près* doctrine is invariably displaced when the residuary bequest is to charity.—The jurisdiction of the Court to act on the *cy-près* doctrine upon the failure of a specific charitable bequest arises whether the residue be given to charity or not, unless upon the construction of the will a direction can be implied that the bequest, if it fails, should go to the residue.—Such a direction cannot be implied from the terms of the above legacies to poor prisoners in *Calcutta* and *Lyons*, especially when compared with the corresponding gift to the prisoners at *Lucknow*, nor can it be inferred from the residuary clause, which in terms disposes of such residue as is left after providing for the said legacies. Mayor of Lyons *v.* Advocate-General of Bengal - - P. C. 91

2. —— *Cession of British Territory—Prerogative of the Crown to cede Territory—Transfer of Jurisdiction—Concurrence of Imperial Parliament—Indian Evidence Act*, 1872, *s.* 113.] In the province of *Kattywar*, subject in its entirety since 1820 to the supreme authority of the British Government, the Thakoor of *Bhownuggur* was possessed of certain talooks, which had never been brought under the ordinary British administration, and in which the Thakoor exercised a wide civil and criminal jurisdiction, subject only to the supervision, laws, and regulations of the *Kattywar* Political Agency. He was also possessed, within the same province, of other talooks, including *Gangli*, which in 1802 had been ceded to the British Government and in 1815 had been placed under the ordinary jurisdiction of the British Courts of the *Bombay* Presidency. In 1848, *Gangli* was included in a lease granted by the British Government to the Thakoor, which by mutual agreement, dated the 23rd of October, 1860, was cancelled, and thereunder the British Government conceded as a favour, not as a right, the transfer of *Gangli* and other territories from the district of *Gogo* which was subject to the regulations, to the districts under the control of the *Kattywar* Political Agency. Delay having arisen in completing this transfer, the Governor General in Council, on the 31st of May, 1865, authorized its completion, "Her Majesty's Secretary of State having decided that *Kattywar* was not British territory." Thereafter, on the 29th of January, 1866, it was notified, in effect, in the *Bombay Government Gazette* that *Gangli*, by reason of the cession thereof by the British Government to the Thakoor of *Bhownuggur*, was removed from and after the 1st of February of that year from the jurisdiction of the Revenue, Civil, and Criminal Courts of the *Bombay* Presidency. And on the 4th of January, 1873 (after the *Indian Evidence Act*, 1872, had come into force), it was notified in effect in the Indian *Gazette* that *Gangli* was, on the 1st of February, 1866, ceded to the state of *Bhownuggur*.—Previous to the notification in 1866, a decree for redemption of mortgaged land situate in *Gangli* was made by the British Court of *Gogo*, and reversed by the Judge of *Ahmedabad;* the case being subsequently remanded to the High Court at *Bombay* to the Judge, who thereupon restored the original decree, notwithstanding that in the interval the first-mentioned notification had appeared. The High Court confirmed this order, holding the notification to be insufficient to prove a transfer of jurisdiction. In review of this order, the High Court confirmed the same, on the ground that it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in *India* in time of peace to a foreign power:—*Held*, by their Lordships, that the appeal from this last-mentioned order passed in review must be dismissed. —The jurisdiction of the Courts of the *Bombay* Presidency over *Gangli* rested in 1866 upon British statutes, and could not be taken away or altered (as long as *Gangli* remained British territory), so as to substitute for it any native or other extraordinary jurisdiction, except by legislation in the manner contemplated by those statutes.—The transfer of British territories from ordinary British jurisdiction to the supervision, laws, and regulations of a political agency, by excluding such territories from the British regulations and codes theretofore in force therein, and from the jurisdiction of all British Courts theretofore established therein, with a view to the substitution of a native jurisdiction under British supervision and control, cannot be made without a legislative Act.—Such transfer of jurisdiction, even if valid, would not amount to a cession of British territory to a native state; nor would it deprive the Crown of its territorial rights over the transferred districts, or the persons resident therein of their rights as British subjects. Although their Lordships entertained grave doubts (to say no more) as to the concurrence of the Imperial Parliament being necessary to effect such cession of territory, yet such cession is a transaction too important in its consequences, both to *Great Britain* and to subjects of the British Crown, to be established by the above decision attributed to the Secretary of State or by any uncertain inference from equivocal acts. Damodhar Gordhan *v.* Deoram Kanji [P. C. 332

INFANT—Grant to—Land in *New South Wales*
See New South Wales, Law of. [82

INFRINGEMENT—Patent—Crown - 632
See Patent. 2.

INSURABLE INTEREST—*"Cargo"*—*Insurance*—*Property passed*—*Costs.*] The purchaser of a "cargo" of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a sum certain "per cwt., cost and freight" has no insurable interest in the purchase (*diss.* Lord *O'Hagan* and Lord *Selborne*), so that should the rice put on board be lost before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel.—*A.* was a merchant in *London*, he entered into a contract for the purchase of rice. The contract consisted of a bought note, which was in the following terms: "Bought for the account of *A.*, of *B. S. & Co.*, the cargo of new crop *Rangoon* rice, per *Sunbeam*, 707 tons register, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by sellers' draft on purchaser at six months sight, with documents attached." *A.* insured the cargo "at and from *Rangoon.*" The ship arrived at *Rangoon* in due time. The loading, by bags, of the rice was rapidly proceeded with; by far the larger portion of the cargo was on board, the remaining bags of rice being in lighters alongside, when the vessel, unexpectedly, sank. The captain afterwards signed and delivered bills of lading, and the purchaser then accepted the seller's drafts, which were duly honoured. In an action as for a total loss, the Court of Common Pleas held that *A.* was entitled to recover. The Exchequer Chamber (*diss. Quain*, J.) reversed this decision on the ground that *A.* had no insurable interest when the loss occurred. On appeal to this House, the Lords were equally divided, and so the judgment of the Exchequer Chamber stood affirmed. No costs were given on the affirmance.—The jury had found, in favour of *A.*, that there was a loss by the perils insured against. This finding was adopted in both Courts. On appeal that decision was affirmed with costs. Anderson *v.* Morice [H. L. (E.) 713

INSURANCE—Fire - - - - 498
See Fire Policy.

—— Marine—Freight - - - 290
See Policy on Freight.

—— Marine—Insurable interest - - 713
See Insurable Interest.

JURISDICTION—Transfer of—Cession of territory - - - - - 332
See Indian Law. 2.

LEASE—Scotch law - - - - 762
See Scotch Lease.

LIABILITY—Shipowner—Bill of lading - 318
See Shipowner's Liability.

—— Shipowner—Compulsory pilotage - 790
See Compulsory Pilotage.

LIBEL—Law of *Nova Scotia* - - 307
See Nova Scotia, Law of.

LIMITATIONS—Statute of—Trustee of Civil Service Fund - - - 281
See Civil Service Fund.

LOAN—Public works—Payment of - 611
See Public Works Loan.

LOCAL ACT—Efficacy of - - - 456
See Harbour Toll.

MACHINERY—New combination of - 514
See Patent. 1.

MALICIOUS PROSECUTION—Law of *Nova Scotia*
See Nova Scotia, Law of. [307

MANDAMUS—Public works loan - - 611
See Public Works Loan.

MARINE INSURANCE—Freight - - 209
See Policy on Freight.

MARRIAGE—Banns - - - 464
See Banns.

—— Evidence of—Scotch Law - - 686
See Evidence of Marriage.

MINERALS—*Grants reserving Minerals.*] Case in which three grants of land, reserving the minerals, but each reservation varying in substance and expression, were held to have respectively secured, and not to have secured, a right to carry outside minerals underneath and through the land granted.—Remarks by Lord *Chelmsford* and Lord *Selborne* as to the question whether the rights reserved were rights of property, or rather in the nature of privileges, servitudes, or easements. Ramsay *v.* Blair - H. L. (Sc.) 701

MINISTERS AND ELDERS—Parish *quoad sacra*
See Banns. [464

MORTGAGE—Forcible entry—Forcible ejection of mortgagee - - - 414
See Forcible Entry.

MUTUAL INSURANCE SOCIETY—*Bombay* Civil Service Fund - - - 281
See Civil Service Fund.

NEGLIGENCE—Evidence of—Contributory negligence - - - - 754
See Evidence of Negligence.

—— Negotiable security - - - 476
See Negotiable Security. 1.

NEGOTIABLE SECURITY—*Foreign Loan*—*Scrip*—*Negotiability*—*Negligence.*] The scrip of a foreign Government, issued by it on negotiating a loan (which scrip promises to give to the bearer, after all instalments have been duly paid, a bond for the amount paid, with interest), is by the custom of all the stock markets of *Europe* a negotiable instrument, and passes by mere delivery to a *bonâ fide* holder for value. English law follows this custom—and any person taking it in good faith obtains a title to it independent of the title of the person from whom he took it.—*Per* Lord *Selborne*: When the instalments mentioned in the scrip have been actually paid, the scrip is as much a symbol of money due, and as capable of passing current by delivery, as the bond itself would be.—The scrip promised to give the bearer a bond for the amount paid. A person who took this scrip as being negotiable, could not, after he had negligently allowed another person the means of transferring (even fraudulently) the possession of it to a *bonâ fide* holder, be heard to deny that the instrument was a negotiable instrument transferable to bearer by delivery.—In the

NEGOTIABLE SECURITY—*continued.*
case of such scrip, issued by a foreign Government and circulated in *England* by means of an agent here, who is to receive the instalments, and give acknowledgments for their payment, and to deliver the bonds when they are issued, the contracting party is the foreign Government, and not the English agent.—*G.* purchased through his broker some Russian and some Hungarian scrip; the undertaking in the scrip was to give to the bearer a bond for the money advanced payable with interest in the way there stated, *G.* left the scrip, (to be exchanged for bonds or sold, as he should direct,) in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself:—*Held*, that the scrip was a negotiable instrument, transferable by mere delivery; and that the banker, being a *bonâ fide* holder for value, was not liable to *G.*, either in trover for the scrip itself, or in assumpsit for the value received upon it. GOODWIN *v.* ROBARTS [**H. L. (E.) 476**

2. —— *Draft—Bill payable on Demand—Stamp—Consideration—Sale of Bills for Abroad.*] A draft drawn for the amount of bills of exchange, purchased for transmission abroad, which amount by the usage of bill brokers is due on the first foreign post-day next after the purchase, and which draft was dated as of that day, is an order for the payment of money on demand, and under the 33 & 34 Vict. c. 97, falls within the description in the schedule to that Act, "Bill of exchange, payable on demand," and is sufficiently stamped with a 1*d.* stamp.—Such a draft or order made by a person who has sold the bills, and addressed to the purchaser of them, constitutes a valuable consideration for a cheque given by the purchaser of the bills.—It does so, though the bills sold may be dishonoured when due.—*L.*, then in good credit in the City, sold to *M.* four bills of exchange, drawn by himself upon *P.* at *Cadiz.* They were sold on the 11th of February, and by the custom of bill brokers were to be paid for on the first foreign post-day following the day of the sale. That first day was the 14th of February. *L.* was much in debt to his banker, and being pressed to reduce his balance, gave to the banker a draft or order on *M.* for the amount of the four bills. This draft or order was dated on the 14th, though it was, in fact, written on the 13th, and then delivered to the banker. On the morning of the 14th the manager of *M.'s* business gave a cheque for the amount of the order, which was then given up to him. *L.* failed, and on the afternoon of the 14th the manager, learning that fact, stopped payment of the cheque:—*Held*, that the banker was entitled to recover its amount from *M.* MISA *v.* CURRIE - **H. L. (E.) 554**

NEW COMBINATION—Patent - - 574
See PATENT. 1.

NEW PARISH—Churchwarden - - 513
See CHURCHWARDEN.

NEW SOUTH WALES, LAW OF—*Crown Lands Alienation Act,* 1861, *s.* 13—*Grants to Minors.*] A grant of Crown land made by the Governor of *New South Wales* under the *Crown Lands Alienation Act,* 1861, to a person under the age of twenty-one is not necessarily null and void to all

NEW SOUTH WALES, LAW OF—*continued.*
intents and purposes.—*Quære*, whether the Governor would be bound to accept an application under that Act from an infant of so tender years as to be incapable of subscribing the necessary form, or of exercising any judgment, or even understanding the question with which it had to deal.—The words "any person" in sect. 13 of the said Act need not necessarily be restricted to all persons above the age of twenty-one. O'SHANASSY *v.* JOACHIM - - - - **P. C. 82**

NEW TRIAL—Patent - - - 574
See PATENT.

NEW ZEALAND, LAW OF—*Southland Waste Lands Act,* 1865—*Statutory Contract.*] The Appellant, under sect. 12 of the *Southland Waste Lands Act* of 1865, on the 7th of July, 1873, caused his name to be entered in the application book mentioned therein as a person desirous to make an application to the Board for a grant of certain Crown lands. At that date the price of such lands was £1 an acre; but on the 9th of the same July the price thereof was raised to £3 an acre, the applicant receiving immediate notice thereof. On the 10th of July the Appellant's application was presented to the Board, which then determined that he was entitled to purchase the land, no price being specified either in the application or by the Board.—Upon a rule *nisi* for a mandamus to the Receiver of Land Revenue to receive payment from the Appellant at the rate of £1 per acre for the said lands:—*Held*, that the grant of the application must be taken to have been at the price ruling on the 10th of July, namely, at £3 an acre, and not at the price ruling at the date of Appellant entering his name in the application book. BELL *v.* RECEIVER OF LAND REVENUE OF SOUTHLAND - - - - - **P. C. 707**

NOVA SCOTIA, LAW OF—*Demand under Canadian Insolvent Act of* 1869—*Writ of Capias—Libel and Malicious Prosecution—Misdirection.*] Declaration in the Supreme Court of *Halifax, Nova Scotia,* charging the Defendants in the first three counts with falsely and maliciously writing and publishing concerning the Plaintiff the words contained in a certain notice served upon him under sect. 14 of the Statutes of *Canada,* 32 & 33 Vict. c. 16, requiring him, being indebted to them or others on certain promissory notes long overdue, to make an assignment of his estate and effects for the benefit of his creditors, and alleging in the fifth count that the Defendants maliciously and without reasonable or probable cause obtained a writ of *capias* against the Plaintiff, in an action on certain promissory notes of which the Plaintiff was the maker and the Defendants were the indorsees for value, by falsely and maliciously representing by a false affidavit that the Plaintiff was about to leave the province, and alleging the arrest of the Plaintiff thereunder and his subsequent discharge by an order of Court on its appearing that he was not about to leave the said province.—Plea to the first three counts, a denial of publication to any one but the Plaintiff, and that the notice contained a true statement of facts; to the fifth count, that having been informed and believing that the Plaintiff was about to leave the province the Defendants caused proceedings to be taken to recover their debt, which was of long

NOVA SCOTIA, LAW OF—*continued.*
standing.—The Judge directed the jury that if the Defendants did not at the time of the arrest believe that their debt would be otherwise lost, and acted with a view to protect the interests of the indorsers of the notes rather than their own, that would be evidence of want of reasonable and probable cause for arresting, and entitle the Plaintiff to damages; and the Court subsequently, in discharging a rule nisi for a new trial, held that the general verdict, including damages in respect of the first three counts, was justified on the ground that the pleas of the Defendants to those counts did not deny the material allegations of publication, falsity, and malice:—*Held*, that there was misdirection, which justified a new trial. There was reasonable and probable cause for the arrest if the Defendants believed that the Plaintiff was about to leave the province, and that their remedy against him would be lost if he were not arrested; notwithstanding they might have believed that they could recover the debt from the indorsers, and were endeavouring to protect the interests of the indorsers.—The said notice being a legal proceeding was *primâ facie* privileged, and no action would lie for the delivery of it to a third person for service upon the Plaintiff unless upon proof of express malice. The allegation of falsity was implicitly denied, and there was therefore no necessity to expressly deny malice. BANK OF BRITISH NORTH AMERICA *v.* STRONG - **P. C. 307**

PARISH—Churchwarden—New parish - **513**
See CHURCHWARDEN.

—— *Quoad sacra—Scotland* - - **464**
See BANNS.

PARTNERSHIP—Contract for—No date or duration - - - - - **174**
See PARTNERSHIP AT WILL.

—— Proof against bankrupt partner's estate **195**
See PROOF AGAINST CO-PARTNER.

PARTNERSHIP AT WILL—*Loan*—28 *&* 29 *Vict. c.* 86—*Sale of Business.*] *A.*, in June, 1869, borrowed £250 from *B.*, and, at the time, signed a paper in the following words:—"In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the *Oxford Music Hall and Tavern*, to be drawn up under the *Limited Partnership Act* of the 28 & 29 Vict. c. 86, called an 'Act to amend the Law of Partnership:'"—*Held*, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which *A.* promised to repay *B.* on the 1st of September, 1872, the principal sum together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to *B.* on that day. This letter was followed by a tender, which was not accepted.—On a bill filed by *B.* for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, *A.* put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872:—*Held*, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day.—*Per Lord Cairns*, L.C.: A co-partnership in profits is a co-partnership in the assets by which the profits are made.—*Per* Lord *Chelmsford*: In order to bring a case within the 28 & 29 Vict. c. 86, there must be a contract in writing, and the document must shew on the face of it that the transaction is one of loan: and parol testimony to vary it is inadmissible.—In a case like the present the Court of Chancery has power, in its discretion, to grant either a sale of the undertaking as a going concern, or a proposal for a purchase (by the holder of the seven eighth share) of the one-eighth share mentioned in the agreement. The House, under the circumstances here, adopted the latter course.—The decrees of the Court below varied accordingly, and the cause was remitted to be dealt with according to the Order of the House. SYERS *v.* SYERS - - - - **H. L. (E.) 174**

PASSENGER TRAFFIC DUTY — *Railway* — "*Cheap Trains*"—*Board of Trade—Dispensing Power.*] The 5 & 6 Vict. c. 79, s. 4, imposes a duty upon the receipts of railway companies derived from the carrying of passengers. The 7 & 8 Vict. c. 85, for the purpose of securing certain advantages to "the poorer classes of travellers," directs, sect. 6, that all railway companies shall, "by means of one train at the least to travel along their railway from one end to the other of each trunk, branch, or junction line, once at the least each way, on every week day, &c.," "provide for the conveyance of third-class passengers to and from the terminal and other ordinary passenger stations." The 6th section then states seven "conditions." The first requires the train to start at an hour approved by the Lords of the Committee of Trade; second, to travel at the rate of twelve miles an hour, including stoppages; third, to take up and put down passengers at every station it shall pass; fourth, seats and protection from the weather to be provided in a manner satisfactory to the said Lords; fifth, the charge shall not exceed one penny a mile; sixth, each passenger by such train shall be allowed to take with him a half-hundredweight of luggage not merchandise; and seventh, provision is made for the fares of children. The 8th section provides that, "Except as to the amount of fare for each passenger by such cheap trains, which shall in no case exceed the rates hereinbefore provided, the Lords, &c., shall have a discretionary power of dispensing with any of the conditions hereinbefore required in regard to the conveyance of passengers by such trains, in consideration of such other arrangements in regard to speed, covering from weather, seats, or other particulars, as shall appear to the said Lords more beneficial," &c. The 9th section enacts that no tax shall be paid on receipts from the conveyance of passengers

PASSENGER TRAFFIC DUTY—*continued.*
at fares not exceeding one penny a mile by any such cheap trains as aforesaid:—*Held*, that the first three and the fifth of the "conditions" contained in the 6th section were absolute, and were not affected by the dispensing power given in the 8th section, for that the dispensing power applied only to "conditions hereinbefore required in regard to the conveyance of passengers by such trains" as therein specified.—Train A of the *North London Railway* started from the main terminus at *Broad Street*, and ran to *Dalston Junction*, taking passengers at a penny a mile, and stopping at every station:—*Held*, that so far it was a cheap train, and was within the exemption from the tax.—Train B started a little later from *Broad Street*, did not stop at the intervening stations, and came up with train A at *Dalston*. There, the original passengers of train A (there being no unreasonable delay) got into it and proceeded to *Kew*, stopping at every station, paying a fare of only a penny a mile, and performing the journey at the rate of twelve miles an hour, including stoppages:—*Held*, that train B was, as from *Dalston Junction*, to be considered as a continuation of train A, and that the exemption therefore applied to it; but that, so far as concerned train B in its passage from *Broad Street* to *Dalston*, it was not to be considered as a cheap train, for that no train was to be treated as a cheap train where the fare exceeded one penny a mile, and where the train did not stop at every (not merely every ordinary) passenger station on the line between one terminus and another:—*Semble*, *per* Lord *Chelmsford*: If a railway company should have one train a day which conformed to all the requirements of the Act, and should be desirous of running other additional cheap trains on the same lines, which should not be obliged to stop at every station, the Board of Trade might dispense with the condition as to these additional trains, and by such dispensation exempt the company from payment of duty. North London Railway Company *v.* Attorney-General **H. L. (E.) 148**

PATENT—*Letters Patent for a new Combination of old Machinery—Proof required—Specification—New Trial.*] If the combination and application of old machinery be new and beneficial, the invention of this combination may be protected by patent.—*Per* Lord *Cairns*, L.C.: If there is a patent for a combination, the combination itself is the novelty, and also the merit, which must both be proved by evidence.—*Per* Lord *Penzance*: In the present case all questions of fact were withdrawn from the jury.—*Per* Lord *Cairns*, L.C.: The specification appears to me *ex facie* to distinguish the new from the old where it is necessary to distinguish the new from the old; and to claim for a combination in a manner which is sufficient.—Interlocutor appealed from reversed, and the case sent back for a new trial. Harrison *v.* Anderston Foundry Company **H. L. (Sc.) 574**

2. —— *Infringement — Crown — Servants or Agents.*] The Crown has the right to the use of a patented process or invention without compensation to the patentee.—*Per* Lord *Selborne*: This right of the Crown is not because the Crown is impliedly excepted from the effect of the letters patent, but because the privilege thereby granted

PATENT—*continued.*
is granted against the subject only, and not against the Crown.—A patent in the usual terms was granted for an improvement in the manufacture of fire-arms. The Secretary at War issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, *minus* the cost of the steel barrels and the stocks, which the War Office was to supply. The rifles were to be delivered within a certain time, the manufacture of them might be inspected at any time, and they might be rejected by officers at the War Office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:—*Held*, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the Crown doing the work of the Crown, but were private contractors with the Crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the Crown.—*Feather* v. *The Queen* (6 B. & S. 257) considered, and assumed to be rightly decided; but not to be extended. Dixon *v.* London Small Arms Company
[**H. L. (E.) 632**

PEERAGE—*Scotch Earldom—Descent of—Circumstantial Evidence—Presumption in favour of Heirs Male.*] Queen *Mary's* creation of the Earldom of *Mar* in 1565 proved by a long train of circumstantial evidence.—*Per* Lord *Chelmsford*: Upon a review of all the circumstances of the case, I have arrived at the conclusion that the determination of it must depend solely on the effect of the creation of the dignity by Queen *Mary* and on that alone: and there being no charter or instrument of creation in existence, and nothing to shew what was to be the course of descent of this dignity, the *primâ facie* presumption of law is that it is descendible to heirs male, which presumption has not in this case been rebutted by any evidence to the contrary. I am, therefore, of opinion that the dignity of Earl of *Mar* created by Queen *Mary* is descendible to the heirs male of the person ennobled, and that the Earl of *Kellie*, having proved his descent as such heir male, has established his right to the dignity.—*Per* Lord *Redesdale*: I presume that the Committee will accept Lord *Mansfield's dictum* in the *Sutherland Case* as the ruling principle in this claim. On that occasion he said: "I take it to be settled, and well settled, that when no instrument of creation or limitation of honours appears, the presumption of law is in favour of the heir male, always open to be contradicted by the heir female upon evidence shewn to the contrary. The presumption in favour of heirs male has its foundation in law and in truth." (Maidment's Report of the *Sutherland Case.*)—There is nothing in the evidence before us to contradict that presumption; and I therefore consider that the Earl of *Kellie* has made good his claim to the Earldom of *Mar* created by Queen *Mary*.—*Per* Lord *Cairns*, L.C.: It is clearly made out that the title of *Mar* which now exists was created by Queen *Mary* sometime between the 28th of July and the 1st of August, 1565; and the only question in the case is whether

PEERAGE—*continued.*
that peerage so created by Queen *Mary* should be taken to be, according to the ordinary rule, a peerage descendible to male heirs only, or whether it should be taken to be a peerage descendible to heirs general. Now the *primâ facie* presumption being in favour of heirs male, there is absolutely nothing which can be taken to be evidence in any way countervailing that *primâ facie* presumption.—The burden of proof lies upon the opposing Petitioner, and it not having been in any way discharged, I am compelled to arrive at the conclusion that this must be taken to be a dignity descendible to heirs male, and therefore that it is now vested in the Earl of *Kellie.*—*Per* Lord *Chelmsford:* In the competition between *Bruce* and *Baliol* for the crown of *Scotland*, the assessors appointed by King *Edward*, in answer to questions put to them, stated that "earldoms in the kingdom of *Scotland* were not divisible, and that if an earldom devolved upon daughters, the eldest born carried off the whole in entirety," thus speaking of a descent to females as a possible event. Lord *Mansfield*, therefore, in the *Cassilis Case* (Maidment's Report of the *Cassilis Case*), uses language too unqualified in saying of earldoms and other territorial dignities, that they "most certainly descended to the issue male." MAR PEERAGE [H. L. (Sc.) 1

—— Circumstantial evidence - - 278
See CIRCUMSTANTIAL EVIDENCE.

PILOT—Licensed—Liability of shipowner - 780
See COMPULSORY PILOTAGE.

POLICY—Fire - - - - - 498
See FIRE POLICY.

—— Marine—Freight - - - 209
See POLICY ON FREIGHT.

POLICY ON FREIGHT—*Prepayment.*] Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid: and that such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner.—A ship was chartered to sail from *Greenock* to *Bombay*, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one half in cash on signing bills of lading less four months' interest at Bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at *Bombay*, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on *London* at six months' sight." Half of the estimated amount of the freight was paid in *London*. The shipowner effected two insurances, one for £500 "on freight valued at £2000," the other for £700 on "freight payable abroad valued at £2000." The ship was lost before entering *Bombay* harbour, but one half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—*Held*, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in *England*; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half.—The *dictum* of Lord *Kingsdown* in *Kirchner* v. *Venus* (12 Moo. P. C. 361) considered and explained. ALISON *v.* BRISTOL MARINE INSURANCE COMPANY [H. L. (E.) 209

POSSESSION—Mortgagee - - - 414
See FORCIBLE ENTRY.

PRACTICE—Dismissal of bill - - 139
See DISMISSAL OF BILL.

—— Staying proceedings - - - 780
See STAYING PROCEEDINGS.

PREPAYMENT—Freight—Insurance - 209
See POLICY ON FREIGHT.

PRESUMPTION—Marriage—Habit and repute
See EVIDENCE OF MARRIAGE. [686

PRIVATE ACT—New parish—Churchwarden 513
See CHURCHWARDEN.

PROOF—Bankruptcy—Partner's estate - 195
See PROOF AGAINST CO-PARTNER.

—— Novelty of patent - - - 574
See PATENT. 1.

PROOF AGAINST CO-PARTNER—*Bankruptcy.*] It is the settled rule in bankruptcy that a partner cannot prove, under a joint commission against his firm, in competition with the creditors of the firm.—And this rule applies in a case where the partner had died before the bankruptcy, his share had been taken by the other partners under the provisions of the partnership deed, and the money due in respect of it had not been paid to his executors at the time of the bankruptcy. NANSON *v.* GORDON - - - - H. L. (E.) 195

PROPERTY—Heritable or moveable—Scotch lease
See SCOTCH LEASE. [762

—— Passing of - - - - - 713
See INSURABLE INTEREST

PUBLIC WORKS LOAN—*Mandamus—Payment of Loan—Limitation of Time—57 Geo.* 3, *c.* 34—5 *Geo.* 4, *c.* 36—19 *&* 20 *Vict. c.* 104.] A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review.—The 5 Geo. 4, c. 36, s. 1, gives to churchwardens and overseers of parishes the power to borrow money from the Public Works Loan Commissioners for the purpose of building or repairing churches, &c., and gives the Commissioners the power to make loans to them for such purposes. It then confers on the churchwardens the power to make rates for the repayment of such loans, "by annual or half-yearly instalments within the period of twenty

PUBLIC WORKS LOAN—*continued.*
years, at farthest, from the advancing of any such sums respectively:—*Held*, that, after the expiration of the twenty years the churchwardens and overseers had no power to make a rate for the purposes of paying money borrowed under the Act, and that, consequently, a mandamus commanding them to do so could not be sustained.—The 15th section of 19 & 20 Vict. c. 104, does not affect this matter.—A power of that sort given in any particular Act must be exercised in exact accordance with the authority given, and the restrictions imposed, by the Act itself.—*Per* Lord *Hatherley*: The power given in the 5 Geo. 4, c. 36, s. 1, to the Public Works Loan Commissioners to regulate the mode and proportions of a rate for the payment of a loan made by them (a power which must be exercised in a reasonable manner), would prevent the loss of the last instalment, though it might not become actually due until the end of the twenty years.—*Per* Lord *O'Hagan:* The Legislature having given ample authority and facilities for making the rates so as to secure payment of the loan within the time limited, has created an implication that it did not mean to allow the making of any rate after that time had passed. Reg. *v.* Churchwardens of All Saints, Wigan - - - - **H. L. (E.) 611**

QUEENSLAND, LAW OF—*Queensland Gold Fields Act*, 20 *Vict. c.* 29—*Rules of* 1866—*Ordinary Quartz Claim—Ownership of Claim and Incidents thereof—Discoveries of Gold in "new Locality."*] On the 14th of April, 1868, the Appellants took up and registered an ordinary quartz claim, known as *M.*, under the *Queensland Gold Fields Act*, 20 Vict. c. 29, and the rules issued thereunder in 1866, and marked out the boundaries thereof upon what they supposed to be the line of the *M.* reef.—The Respondents were transferees of another claim or reef known as *G.*, allotted and registered on the 1st of July, 1868; but the southern boundary of their claim was eventually placed by the gold commissioner within the lateral limits of the Appellant's claim.—In an action by the Respondents in the Supreme Court of *Queensland* to recover damages for a trespass alleged to have been committed by the Appellants in the Respondents' claim, and in their mine under the surface thereof, and for taking and removing therefrom certain gold and gold-bearing quartz, and converting the same to their own use, it appeared that the quartz taken by the Appellants, though within the boundaries marked out by them as their claim, had been taken from the *G.* reef within the boundaries of the Respondents' claim as finally marked:—*Held*, that the Respondents, as ordinary quartz reef claim holders, were entitled to the gold and quartz, the subject of the action, and to recover damages against the Appellants for removing and converting it to their own use.—Secondly, that under the Regulations of 1866 an ordinary quartz claim did not vest in the holder the right to all gold or quartz beneath the surface area of the claim; and that under Rule 58 such claim was not a block claim, but was confined to the line of the quartz reef in respect of which the claim was taken up.—Thirdly, that the Respondents' claim entitled them to all the gold in the *G.* reef within the lateral limits to which they were entitled, provided that they did not trespass upon the claim of any other miner.—Fourthly, the Appellants' claim being limited to the line of the *M.* reef, the Respondents were not trespassing on the Appellants' claim by taking gold and quartz from the *G.* reef.—An ordinary quartz reef claim is a claim on the line of a quartz reef, and is confined to the particular reef to which the claim refers, and the holder of it is not entitled to take gold or quartz from any other reef within the area or limits of the claim.—Under the rules the discoverers of gold in any new locality, not exceeding two miles from any known working reef, are entitled to a reward claim of 120 feet in length; and if already holders of miner's rights, to an ordinary quartz claim in addition to a reward claim.—The claims of both parties and their rights and interests thereunder, which were created before the Rules of 1868 or 1870, must be determined with reference to the Rules of 1866. Hollyman *v.* Noonan **P. C. 595**

RAILWAY COMPANY—Negligence - **754**
See Evidence of Negligence.

—— Passenger traffic duty - - **146**
See Passenger Traffic Duty.

REASONABLE EXCUSE—Malicious prosecution
See Nova Scotia, Law of. [**307**

RESERVATION OF MINERALS - - **701**
See Minerals.

RESIDUE—Gift to charity—*Cy-près* - **91**
See Indian Law. 1.

RIPARIAN OWNER—*Thames Conservancy Act* (20 & 21 *Vict. c. cxlvii.*).] By the *Thames Conservancy Act* (20 & 21 Vict. c. cxlvii.), s. 53, the Conservators appointed under that Act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner.—The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages, or for an injunction. It comes therefore within the operation of the saving clause (sect. 179) of the *Thames Conservancy Act.*—The right of a riparian owner to the use of the stream does not depend on the ownership of the soil of the stream.—The power granted to the Conservators under the 53rd section of the 20 & 21 Vict. c. cxlvii., is qualified and restricted by the provisions of the 179th section. Lyon *v.* Fishmongers' Company **H. L. (E.) 662**

SALE OF BUSINESS—Partnership - - **174**
See Partnership at Will.

SALVAGE—*Towage Services—Arrest of Ship—Demurrage.*] In a salvage suit promoted in respect of certain services whereby the Defendant's

SALVAGE—*continued.*
vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:—*Held,* that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit.—*The Charlotte* (3 W. Rob. 68) approved.—No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of *mala fides* or malicious negligence.—*The Evangelismo* (12 Moo. P. C. 352; Swabey, 378) approved. Turnbull *v.* Owners of the Ship "Strathnaver." The "Strathnaver" - **P. C. 58**

SCHOOL—Endowed Schools Act—Compensation
See Endowed Schools Act. [68

SCOTCH EARLDOM - - - - - 1
See Peerage.

SCOTCH LAW—Evidence of marriage - 686
See Evidence of Marriage.

SCOTCH LEASE—*Heritable Character of a Scotch Lease—Machinery annexed to Leasehold—Fixtures.*] A lease in *Scotland* is heritable, not moveable or personal, as in *England*, but descending to the heir of the lessee. Whether the lease be in perpetuity or for a term of years the descent will be the same.—When machinery has been annexed to the leasehold soil for the working of coal underneath, it descends with the soil to the heir of the lessee.—*Per* Lord *Cairns*, L.C.: There is certainly no authority for saying that the executor can remove fixtures as against the heir. Bain *v.* Brand - - - - **H. L. (Sc.) 762**

SCOTCH PARISH—Parish *quoad sacra* - 464
See Banns.

SCRIP—Foreign loan - - - 476
See Negotiable Security. 1.

SECURITY—Negotiable - - 476, 554
See Negotiable Security. 1, 2.

SERVICE—Agency—Contract to employ agent
See Contract to employ Agent. [256

SHARES—Forfeiture of—Law of *Victoria* - 39
See Victoria, Law of.

SHIP—Compulsory pilotage—Shipowner's liability
See Compulsory Pilotage. [790

—— Fire policy - - - - 498
See Fire Policy.

—— Freight—Insurance - - - 209
See Policy on Freight.

—— Insurance—Insurable interest - - 713
See Insurable Interest.

—— Liability of shipowner - - - 318
See Shipowner's Liability.

—— Salvage—Towage - - - 58
See Salvage.

SHIPOWNER—Liability—Bill of lading - 318
See Shipowner's Liability.

—— Liability of—Collision - - 790
See Compulsory Pilotage.

SHIPOWNER'S LIABILITY—*Bill of Lading—Damage—Condition as to Delay in making Claim.*] By a bill of lading made in *England* by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of *Montreal*" . . . "unto the *Grand Trunk Railway Company*, and by them to be forwarded thence per railway to the station nearest to *Toronto*, and at the aforesaid station delivered to the consignees or to their assigns."—The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed."—In an action in the Superior Court of *Lower Canada* against the shipowner for the value of damage done to the said packages during the voyage, it appeared that the same were landed, placed in certain shipping sheds, removed therefrom to railway freight-sheds in *Montreal*, and finally delivered to the consignees in *Toronto*. No notice of damage was given until thirteen days after the delivery was completed:—*Held*, that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages conducted with reasonable care and skill at the place of removal have been discovered.—The bill of lading in this case was a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim could be made apart from the express condition contained therein; notwithstanding the provisions of Article 1680 of the Canadian Civil Code. Moore *v.* Harris - - **P. C. 318**

SOUTHLAND—Waste Lands Act, 1865 - 707
See New Zealand, Law of.

SPECIFICATION—Patent - - - 574
See Patent. 1.

STAMP—Bill payable on demand - - 554
See Negotiable Security. 2.

STATUTES:
15 Ric. 2, c. 2—*Forcible Entry* - - 414
See Forcible Entry.
57 Geo. 3, c. 34—*Public Works* - - 611
See Public Works Loan.
5 Geo. 4, c. 36, s. 1—*Church Rates* - 611
See Public Works Loan.
3 & 4 Wm. 4, c. 27, s. 25—*Limitations* - 281
See Civil Service Fund.
5 & 6 Vict. c. 79, s. 4—*Stamp Duties* - 146
See Passenger Traffic Duty.
7 & 8 Vict. c. 85, s. 9—*Railways* - - 146
See Passenger Traffic Duty.
19 & 20 Vict. c. 104, s. 15—*Church Building*
See Public Works Loan. [611
20 Vict. c. 29—*Queensland Gold Fields* 595
See Queensland, Law of.
20 & 21 Vict. c. cxlvii.—*Thames Conservancy*
See Riparian Owner. [622
25 Vict. No. 1—*New South Wales Crown Lands Alienation Act* - - - 82
See New South Wales, Law of.
27 & 28 Vict. c. 60—*Canada* - - 384
See Canada, Law of.
28 & 29 Vict. c. 86—*Partnership* - 174
See Partnership at Will.

STATUTES—*continued.*

32 & 33 Vict. c. 56, ss. 13, 39—*Endowed Schools Act* - - - - - 68
See Endowed Schools Act.

36 Vict.—*Indian Evidence Act* - - 332
See Indian Law. 2.

STATUTORY CONTRACT—Crown lands - 707
See New Zealand, Law of.

STAYING PROCEEDINGS—*Stay of Suit for the expected Decision of another Court refused.*] Whether a Court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority, is merely a question for the exercise of judicial discretion.—If there be any want of power in the Court it may be well that the proceedings should be stayed in order that some other Court which has the requisite power may adjudicate.—*Per* Lord *Selborne*: I am far from saying that there might not be cases in which a proceeding in a foreign Court might be regarded as a satisfactory way of ascertaining the legal rights of parties; and the Scotch Courts might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion and say the Court of Session must take into consideration what has been done in the English suit. There was no lack of materials in *Scotland* for the necessary purposes of justice. Phosphate Sewage Company *v.* Molleson - - H. L. (Sc.) 780

STREET—Closing end of—Compensation—Law of *Lower Canada* - - - 384
See Canada, Law of.

TENDER—Engineering contract - - 120
See Implied Warranty.

THAMES CONSERVANCY ACT, ss. 53, 179 662
See Riparian Owner.

TIDAL RIVER - - - - 662
See Riparian Owner.

TOLL—Harbour - - - - 456
See Harbour Toll.

TOWAGE—Salvage - - - - 58
See Salvage.

TRUST FOR SALE—*Will—Distribution—"Received"—"Receivable"—"Decide"—Trust or Power—Court—Costs.*] *Frederick Hobson*, the elder, by his will, gave to three trustees (one of whom was his eldest son *William*) all his real and personal property, which included the proprietorship of a newspaper, on trust to carry on the newspaper during the life of his wife, and they were annually to set apart and invest one fourth of the profits of the paper as a reserve fund to meet emergencies, and to divide the remaining three fourth parts of the profits of the same, and the income from his real and personal estate, into six equal parts for his wife and five children (all specially named), and in case of the death of any such child during the life of the wife, to pay the share of that child to the lawful issue of that child, or if none such, equally among the survivors of his children. And, after the decease of his wife, "(or during her life if she and the majority of my children, and my trustees, shall deem it proper and expedient so to do), at the sole discretion of my trustees," to sell the real and personal estate and the newspaper, and divide the proceeds among the wife and children, bringing in the amount of the reserve fund as part; the shares to be for their absolute use and benefit immediately after such division. He declared that, "in case, under the above clause, it shall be agreed, or my trustees shall decide to sell" the paper, and if any of his sons should wish to carry on the same, such one should be entitled to purchase it at £500 less than the market price. Till all the property was sold the trustees were to apply the income of the part unsold in the manner before expressed as to the income of the real and personal estate:—*Held*, that the will created not a mere power, but a trust, to sell, with a discretion in the trustees as to the manner and particular time of selling; that after the death of the wife the trust to sell became absolute; that on the happening of that event the shares of the survivors became absolutely vested; and (there being but three children of the testator then surviving) that *William Hobson* took an absolute vested interest in an equal third part of the testator's real and personal estate, including the newspaper.—*Per* Lord *O'Hagan*: The mere fact of the non-sale did not prevent the vesting of the shares.—Observations by Lord *Selborne* on the construction and effect of the divesting clauses in the will.—After trustees have invoked the aid of the Court in administering an estate, and a decree has been made, they cannot act in the matter of the administration except under the sanction of the Court.—An order of the Lords Justices, reversing that of Vice-Chancellor *Hall*, being itself reversed, and that of the Vice-Chancellor restored, the costs of the appeal to the Lords Justices were given to the Appellant, but no costs of the appeal to this House were given. The costs of the trustees were ordered to be paid out of the estate. Minors *v.* Battison - - H. L. (E.) 428

TRUSTEE—Civil Service Fund—Statute of Limitations - - - - 281
See Civil Service Fund.

—— Costs - - - - - 428
See Trust for Sale.

USAGE—Common law rights—Private Act 513
See Churchwarden.

—— Ship—Fire insurance - - - 498
See Fire Policy.

VICTORIA, LAW OF—*Shares—Invalid Forfeiture—Waiver—Acquiescence.*] There must be properly appointed directors to make a call or to declare a forfeiture of shares.—A declaration of forfeiture (for non-payment of a call) of shares in a company registered in *Victoria* under 27 Vict. No. 228, was made on the 18th of June, 1869, by a resolution of the board of directors, consisting of a quorum of three, *H.*, *B.*, and *A.*, who had been elected (with two others) at a quarterly general

VICTORIA, LAW OF—*continued.*
meeting of the company held on the 14th of April, 1869; which meeting had been convened by advertisement, published on the 8th, 10th, and 13th of April, for the election of a full board of directors. It appeared that *H.* and *A.* had been previously elected directors on the 14th of January, 1867, had not retired from office as provided by the rules of the company, but had continued to act as directors up to the 14th of April, 1869:—*Held*, that the said meeting of the 14th of April, 1869, having been held without due notice thereof, according to the rules of the company passed under the provisions of 27 Vict. No. 228, and of the business to be transacted thereat, the election of a full board of directors thereby was invalid, and consequently the subsequent declaration of forfeiture of the 18th of June, 1869, was also invalid. Even if *H.* and *A.* had before that election legally held office, they could not thereafter act under their former title, for the election of a full board, though invalid, necessarily involved the retirement of those, if any, who up to that time had legally held the office of director.—A declaration of forfeiture of shares invalid under the rules of a company registered under 27 Vict. No. 228, before Act No. 354 came into force, is not rendered valid by the latter Act.—Mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. GARDEN GULLY UNITED QUARTZ MINING COMPANY *v.* MCLISTER - - - P. C. 39

VESTED INTEREST—Endowed School - 68
See ENDOWED SCHOOLS ACT.

WARRANTY—Implied - - - 120
See IMPLIED WARRANTY.

WILL—Charity—*Cy-près*—Indian law - 91
See INDIAN LAW. 1.

—— Trust for sale - - - - 428
See TRUST FOR SALE.

WORDS—"Received"—"Receivable" - 428
See TRUST FOR SALE.

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